KHETARPAL (S.P.)

PH.D. 1959.

(Law.)

MARRIAGE AND INHERITANCE IN BURMESE BUDDHIST LAW.

being

A Thesis submitted for the Degree of Doctor
of Philosophy of the University of London.

- by -

S.P. Khetarpal, B.Sc.(Punj.), B.L.(Ran.), LL.M.(Lond.),
of Gray's Inn, Barrister-at-Law.

ABSTRACT.

The main purpose of this Thesis is to examine the available evidence on the extent of the influence of Hindu Law in the field of Burmese personal and family law, in so far as the substance is concerned. The principal source of Burmese Law so far as marriage and inheritance is concerned is the customary law of South East Asia. When the British Courts first administered Burmese Law, the tendency, largely owing to the influence of Jardine and Forchammer was to exaggerate the influence of the Indian Law. This was generall resented by Burmese writers, and recently Lingat has suggested that the Hindu influence was limited to the manner of presentation and to isolated texts. It has however been too readily assumed that the Dharmasashtras are undeviatingly patriarchal. That this is not the case becomes clear from a study of these texts with which practising Hindu Lawyers are normally unacquainted and, in this ~~section~~ thesis attention has been drawn to Dharmasastra texts and institutions in Ceylon which, it is submitted, at least establish a prima-facie case for par of the substance of the common Law of South East Asia being in part ~~described~~ derived from Indian institutions existing before the Brahmanical reaction against Buddhism imposed on the Hindu system the wide spread, rigid, patriachal character which it had when the British first came in contact with it. It also endeavours to set out as clearly as possible, the principles

of Burmese Buddhist Law relating to Marriage and Inheritance, as administered by the Courts in Burma since the British annexation. The case law throughout has been brought to date.

Chapter I indicates the scope of work, and, chapter II is devoted to the origin of Burmese Buddhist Law. Chapter III se out the sources of Burmese Buddhist Law. Chapter IV deals wit the Dhammathats. Chapter V explains the extent of the appli- cation of Burmese Law. Chapter VI deals with Burmese Buddhist Marriages generally. Chapter VII is devoted to consent of parents and guardians in relation to valid marriage. Chapter VIII deals with personal relations of husband and wife. Chapt IX relates to the property of the marriage.

Chapter X and XI are devoted to divorce and partition upc divorce respectively.

Chapters XII, XIII, XIV, XV, XVI deal with general principles of inheritance, rights of remoter heirs, the orasa, partition, and loss of rights of inheritance. Chapter XVII explains the nature of the estate of the heirs and persons entitled to letters of Administration.

The last chapter (XVIII) is a brief summary of the prese position of the law as developed by the Courts in Burma.

Acknowledgment.

I consider it to be one of the happiest duties to plac on record my grateful thanks to those who have helped me ir writing this thesis. I take this opportunity of expressing my gratitude to my mother, brothers and sisters who provide the finance during my tenure of studies in England without which it would have been impossible to present this thesis. It is a pleasant duty to express my sincere gratitude for the encouragement received at all times to Prof: A. Gledhil M.A., LL.D. of the School of Oriental and African Studies, University of London. My debt to him has been all the grea er for his assistance and guidance in the solution of the many problems presented by the materials and for the valua criticisms and suggestions which have made the work a far better one than it would otherwise have been. I also thank Prof: J.N.D. Anderson, O.B.E., M.A., LL.D., Head of the Law Department of the School of Oriental and African Studies, University of Londo for the encouragement I have always received from him.

I would also like to extend my thanks to the Librarian and Staffs of the Institute of the Advance Legal Studies, School of Oriental and African Studies, University College, British Museum, Royal Asiatic Society, Gray's Inn, India House, India Office for affording me every facility I neede while the work was in progress.

I also take this opportunity of expressing my gratitude to Mrs.C.J. Verdier, Miss Vera Dillon, Mr. K.D. Parakh, Mr.Q. Anisuddin and Mr. J. Edmund Foster for assisting me in having this manuscript typed.

London
September, 1959. S. P. Khetarpal.

TABLE OF CONTENTS

A P P E N D I C E S

CHAPTER I

INTRODUCTION.

The subject of this Thesis is 'Marriage and Inheritance in Burmese Buddhist Law'. In order not to mislead the reader, it is, I think, essential to indicate its scope, the problems that it considers, and how far it can be said to provide answers for them.

First, it is necessary to say something about the expression 'Burmese Buddhist Law'. Burmese Buddhist Law or, as it has been called with greater accuracy, the Burmese Customary Law (1) is not the outcome of the teachings of Lord Buddha but is a secular system. Maung Ba, J., observes (2), "We have, however, a number of law books entitled Dhammathats which are primarily intended to apply to Burmans. The religion of that race is Buddhism which was also the State religion when the Burmese Monarch was on the throne. So the Dhammathats intended for the Burmese Buddhists have come to be known as the Burmese Buddhist Law or the Buddhist Law".

The rules contained in the earlier Dhammathats (a corruption of the Sanskrit word Dharmasastra) were set out in the same way as the rules in the Indian Dhamasastras, some texts being borrowed with little or no amendment, but they gradually

---

(1) U E Maung, Burmese Buddhist Law, 1.
(2) Ma Yin Mya v. Tan Youk Pu, (1927) 5 Ran. 406 (F.B.).

diverged from their source through the influence of Buddhism and consequently equality of sexes were introduced (3). Burmese Buddhist Law is not the law of the Dhammathats pure and simple but it is the body of customs observed by Burmese Buddhists (4).

On the question of the influence of Hinduism on Buddhist Law, Jardine and Dr.Forchhammer held the view that the origin of Burmese Law was to be found in Hindu Law, and that many of the rules of Buddhist Law were unintelligible without a reference to Hindu Law Books. In Mi Lan v. Maung Shwe Daing (5) the learned Judicial Commissioner of Upper Burma remarked that 'the Hindu Law has been borrowed though we do not know exactly when and from what source, and has been modified by the requirements of a non-Indian race which has adopted the religion of Buddha. In applying Hindu Law, essential differences of conditions, racial and religious, must have been found in two important particulars, the position of the wife and the constitution of the joint property."

The question arises, whether the above statement is true. For this purpose, I have examined many authorities many of which are not mentioned in the published papers of my predecessors in the field, and have taken the opportunity to

(3) U Tha Gywe, Conflict of Authority, Vol.1, Introduction.
(4) Thein Pe v. U Pet, (1905) 3 L.B.R.175 at 186.
(5) (1892) II U.B.R.(1892-96) 121 at 132.

ascertain and estimate the extent to which Burmese Law is indebted to Hindu Law. I have commenced by setting out the origin of Burmese Buddhist Law in its historical background. I have made a comparative study of the laws of marriage and inheritance of the different countries in South-East Asia, namely Hindu Law, Ancient Indian Law, Kandyan and Thesawalamai Law of Ceylon, Law of Rembaus and ~~Mengkbau~~ Menangkabau of Malaya and Sumatra, and Khasis of Assam (India). I find myself quite unable to agree with Dr.Forchhammer's estimate of the debt due to Hindu jurists as that debt is smaller than his estimate of it.

After the British annexation of Burma, it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognised and respected. (6). Hence Burmese Buddhist Law was applied in Burma in questions regarding succession, inheritance, marriage, caste, or religious usage or institution, when the parties were Buddhists, except in so far as such law had been altered or abolished by a legislation enactment, or was opposed to any custom, having the force of law in Burma. This rule applied immediately after the conquest and was ultimately expressed in the Burma Laws Act (7) in the following form:-

---

(6) Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932) 10 Ran.97.
(7) Section 13 of Act XIII of 1898.

"(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, -

(a) the Buddhist Law in cases where the parties are Buddhist

(b) the Mohammedan Law in cases where the parties are Modammedans, and

(c) the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-section (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Rangoon in the exercise of its original civil jurisdiction.

(3) In cases not provided for by sub-section (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

Hence, it is clear that Burmese Buddhist Law is applied in Burma in questions regarding succession, inheritance, marriage, or caste, when the parties are Buddhists.

Since the publication of Dr.Richardson's translation of the Manugye in 1847, very few standard works on Buddhist Law

have been published. The first was Sir John Jardine's valuable Notes on Buddhist Law, which are contained in 8 pamphlets on Marriage, Divorce, Inheritance and Partition. These Notes form an invaluable guide to all the Courts and have been cited with approval by the Judicial Committee of the Privy Council. The second work in importance, though not in time, was Major Sparks' Code which has been in existence since 1860, and this code has been annotated by Mr.H.M. Lutter. But this work is not usually followed, and the learned author is generally credited with attempting to legislate rather than to state the law as it was, when he wrote, because some of the rules laid down therein are found to be inconsistent with the texts on which they are based. In 1904 Shaw, J.C., made the following remarks(8) :-

"It is strange to find that almost another generation has passed since Mr.Jardine's invitation to scholars to study the Dhammathats, and that beyond Dr.Forchhammer's Prize Essay, the publication and translation of the Kinwun Mingyi's Digest at the instance of the late Mr.Burgess represents all that has been done during that time, while Judicial decisions have been even fewer than before."

Since the publication of the Notes, there has been very little addition made to the study of the Buddhist Law. In 1894 U Chan Toon wrote a treatise, of which a 2nd Edition

---

(8) Mi Kin Lat v. Nga Ba So, (1904) II U.B.R.(1904-06) Divorce 3 at 4.

appeared in 1903, and in 1899 he produced a collection of leading cases. In 1909, U Tha Gywe wrote a treatise on Buddhist Law and in 1919 he produced "Conflict of Authority in Buddhist Law" in two volumes. The late U May Oung (once a Judge of the Rangoon High Court) produced in 1914 treatises on (1) matrimonial law, (2) adoption, pre-emption, gifts, religious usage, and (3) inheritance. A second edition appeare in 1926. Another treatise on the law by S.C.Lahiri was published in 1925. A third edition appeared in 1930. U E Maung, who until recently was a Judge of the Supreme Court of Burma, wrote a treatise on Buddhist Law in 1937. O.H.Mootham published his 'Burmese Buddhist Law' in 1938.

Thus it may be said that the existing authorities are brief and out-of-date. I have therefore made an attempt to describe the present position of Burmese Law relating to Marriage and Inheritance as administered by the Courts in Burma since the annexation. In this work all the published rulings that have been cited, referred to, followed, approved, dissented from, distinguished or over-ruled, have been carefully noted, as well as foreign decisions which have a connection with, or bearings on the law of the land. I have commented on important rulings and in various places I have pointed out errors in the official English translations of the texts. At times, I have, with respect, differed from the views of eminent and learned Judges whose knowledge of the subject is undoubtedly far superior to mine.

CHAPTER II

Origin of Burmese Buddhist Law

(i) The early History of Burma.

Of the origin of Buddhist Law, as of the origin of most things, nothing can be predicated with anything like absolute certainty. Apparent origins are in the ultimate analysis found to be really derivative. The further we go backwards the scantier and vaguer become the materials. Under the best conditions we see only a landscape covered by clouds with only an occasional rift through which the eye can penetrate. But it can be asserted with certainty that every nation and state develops laws or rules of conduct for its members by the collective judgment of the members of that nation or state, so that, from the beginning of the Burmese nation, there must have been some laws which the state prescribed and enforced on its members.

U Chan Toon in the introduction to the second volume of his "Leading Cases on Buddhist Law", says that the ancient Dhammathats are not of home growth but of Hindu origin, as shewn by the late Dr. Forchhammer, formerly Professor of Pali at Rangoon College: "It has been ordinarily considered that the Burmese Law is indigineous. History reveals otherwise as to its origin. The source is quite evident, but Burman-like there has been great assimilation. The invaders, probably from Tibet, had some notion of the sacred nature of Hinduism. They

readily conformed to Hindu influence. It is consistent that there was the desire for Indian influence in matters appertaining to religion. The Indian soothsayers, probably inclined to Buddhism, eagerly sought a home where Buddha-gosha had fostered a new religion. Connecting religion with law as it always occurs in ancient society, the Dhamma Shastras were appealed to by the advisers in guiding a system which should apply to the people though foreign to them. Therefore we have the Dhammathats which the late Dr. Forchhammer has clearly shown to be of Hindu origin. We in Burma are attempting to conform to rules which may possibly be an effort for the people to carry out. Of course this is purely as to the origin of the legal system which is very interesting and may give a historian material for research. The manners and customs of the people, I believe, are of greater importance and we have got to ascertain precisely what those manners and customs are. The regulations regarding the technical rules of inheritance are strange to the people themselves. No doubt the law is not always in harmony with the ordinary knowledge of a people, but at the same time when there is the opportunity to apply beneficial rules we ought to take advantage of it. The Dhammathats are ancient but not of home growth. There is the oriental reverence to things supposed to be of divine origin. The adherence to such ideas must retard progress."

It has been said by Professor Lingat (1) that the law of the Dhammathats is mainly customary law. It contains rules which obviously are adaptations of Hindu Law; but these are few and far between compared with the bulk of the law which bears no relation to the Dharmasastras. The Dhammathats law represents the indigenous law of the Burmese people. The Burmese writers were no doubt influenced by changing customs but seem to have been reluctant to depart from the rules of the earlier Dhammathats. The principal source of Burmese law is the custom of Burma, which, at least so far as marriage law is concerned, is the customary law of South East Asia. It could not have originated either in Hindu or Chinese Law, because the basis of both these laws is the patriarchal family, into which it would be impossible to fit the rules governing the rights of the spouses in the property of the marriage. It has also been said that the debt of the Burmese jurists to the Dharmasastras lies in method rather than in substance (2). It is also said that the Burmese Customary law at the present day is essentially the same as many centuries ago; though Burma has borrowed freely from the great

---

(1) "The Buddhist Manu of the propagation of Hindu Law in Hinayanist Inochina"; Annals of the Bhanderker Oriental Research Institute (Poona), Vol. 30, 284 at 293; R. Lingat, Les Regimes Matrimoniaux Du Sud, Vol. 2.

(2) Dr. Htin Aung, Customary Law in Burma; Burma, the Fifth Anniversary (1953), 67.

cultures of her neighbouring countries, she has been able to preserve its national character and her own national institutions (4).

If we proceed to examine the body of usages and customs practiced amongst the Burmans of the present day, to which have been extended legal recognition by virtue of that sacredness which surrounds all that has been handed down from father to son from time immemorial, we will find practices of definite Indian origin.

Forchhammer observes, "When a Burmese child is born, a punna (Brahman) or a Native astrologer ascertains the position of the constellation (nakshatra) which prevailed at the child's birth; from the aspect of the stars he draws the horoscope, foretelling the events of his life. The ceremonies observed when the child eats the first rice, when the head is shaved and the hair-knot is tied, at the piercing of the ears, at reaching the age of puberty, when betrothed and when marriage is consumated, the punna or Burmese huyazayā is consulted or presides at the ceremony. A Burman has his lucky and unlucky days; during the latter he will not start on a journey, nor undertake any kind of important enterprise. When building a house, he will first ascertain a propitious site where to erect it, set the principa posts according to the instructions received from the punna,

(4) Dr.Htin Aung, Customary Law in Burma, Burma, The Fifth Anniversary, 67.

and reserve a particular corner of the house for the tutelary house nat. In all conditions and stages of life he observes usages and performs ceremonies which are striking enough in themselves, but are not, as is generally maintained, of indigenous growth; tattooing and a few other oddities excepted, they are all of Hindu origin. The Punnas (Sanskrit punya, Pali punna) are Brahmans, who at various periods settled in Burma, generally living in separate quarters in or near the capitals of Burmese kings. The royal astrologers and gurus were always punnas; from the capital they spread all over the country in the capacity of teachers, astrologers, and physicians; ..... they study chiefly the Samaveda. All the ceremonies and usages above referred to have been introduced by these Brahmins (5)". This suggests the possibility that the Burmese customary law may have derived from Hindu Law.

In this part of the Thesis, it is not proposed to deal with the Origin of the Dhammathats at a great length, as it should form the subject of a separate thesis, but an attempt is, however, made to show that the principle source of Burmese Law so far as marriage, divorce, the property of the marriage and inheritance Laws are concerned is the customary law of South East Asia including Ancient India.

In endeavouring to point out the sources and to trace the development of Burmese Law, we have to consider the following points:-

---

(5) E. Forchhammer, The Jardine Prize, 20, 21.

i. The early history of the Talaings and the Burman.
ii. The history and nature of the Hindu civilization with which the Talaings, Burmans, and the Tamils in Ceylon came in contact.

The method which will be later followed is to split the material into a number of arbitrary sections, according as the headings seem to pertain to a fundemental, within each section the Burmese law will, where possible, be compared with Indian material on the same or closely related points. It will thus be possible to see to what extent Burmese customary law may be indebted to Indian Laws.

The legal history of the Burmese being largely unwritten or based upon misconceptions, an attempt is made in a new approach, to make a small contribution, from the legal side, to the early history of the Burmese people. At the outset, we can not altogether neglect certain well-known historical facts.

The present Mongolian inhabitants of Burma came down in successive waves at some unknown period. Perhaps the earliest wave were the Mon. They live in Siam, and in Burma from the delta downwards. North of Henzeda up to Bhamo, the heart-land of Burma, was taken up by later waves, traditionally known as the Pyu, Kanran and Thet. Some people say they came from the Gangetic plain in Bengal from which they were slowly driven out in the course of centuries.

The mass of the Burmese are Mongolians who came from over the Himalaysa, from the great Mongolian mainland in Central Asia. They were yellow savages from Central Asia, except for their leaders who had a veneer of civilisation and came from India. In this tale of their coming from North India it is at least true that the last wave, the Thet were Sakyas from Bengal. Their surviving traditions were Indian because their own Mongolian traditions had died out; the only classes among them who could read and write and keep traditions alive, were their ruling classes, the Thet or Sakyas (6).

Indian fnfluence came to Burma in two streams, one from the Aryan North of India, the other from the Dravidian South. The stream from the Dravidian South was from Telingana on the Coromondel coast in Madras; it came as a ruling race which established itself at Thaton and dominated the Mon. It is from these Telingana kings that the savage Mon got their present name 'Talaing'. There are besides a considerable number or words of Sanskrit origin in the Mon idiom which points to a long-continued intercourse between the Talaings and India or Indian settlers on their shores who used Sanskrit as the medium of at least scientific lore; such words as draht, physical strength, from the Sanskrit root drih, darhati, drahyat; upadrao, calamity, skr.,

---

(6) G. E. Harvey, The Writings of Burmese History, Journal of the Burma Research Society, Aug. (1919), Vol. IX, part II, 63.

skr. = Sanskrit

upadrava (pali upaddava); irahat, to give power, from the skr, ṛi, iray-ate; sri, glory, skr, srī, pali seri; tri, three; skr, tri; pali ti (7) etc.

Thaton appears to have been the colony which exercised the most lasting influence upon the surrounding Native tribes; through this colony we can best trace the influence of Indian learning and culture; it gave the nations of the Further India an alphabet and led to the erection of religious buildings, which are a reflex of the many traces of the South Indian, or more specifically Dravidian type.

Talaing records contain information about South India; they mention intercourse with the eastern coast of the Deccan during the supremacy of Buddhism in those regions. The city of ~~Kanaptra~~ Kāñcīpura (Conjeveram), Dhammapāla are often mentioned (8).

We also know (9) that in 240 B.C., during the reign of Asoka there came from Ceylon to the Talaing capital of Thaton two missioneries Sona and Uttara, who introduced Buddhism. The stream from the Aryan north came from Kapilavastu, in Oudh; in 800 B.C. men of the Thet or Sakya tribe, which later produced Prince Sidharta, the Buddha, came to Tagaung. These Sakyas of Tagaung went south and in 443 B.C. found Therekhettara or Prome. It was a wonderful age; Indian philosophy had spread to Asia Minor, and Buddha had just ceased preaching in Northern India. Probably the

---

(7) The Jardine Prize - an Essay, 23-24.
(8) The Jardine Prize - an Essay, 24.
(9) G. E. Harvey, The Writings of Burmese History, Journal of the Burma Research Society, Vol. IX, Part II, 64.

Sakyas introduced Buddhism in Upper Burma about the time of the foundation of Prome. Excavation at Tagaung have revealed Buddhist images, bricks stamped with Buddha's image, and Pali inscriptions in a North Indian script of the type used very early in Christian era. By the 5th century, Prome and Thaton became important as ports of call for Hindu merchant ships sailing between India and Malaya and Java (10).

(2) Triumph of Hinayana

Buddhism under Anawrahta

Anawrahta (pagan) is a notional hero. There came from Thaton the great missionary Shin Arahan, who was a son of a Thaton Brahman. At once Anawrahta was converted. He stamped out the foul dragon worship, expelled the Ari and set about establishing Buddhism. But he had no copies of the scripture, so he asked Manuha, King of Thaton for copies. Religion and civilization at Thaton were at a higher level than in the rude north country at Pagan. Buddhism at Thaton was not the degraded Tartric Buddhsim of the Mahayana or Northern school; it was the pure form, from the Hinayana or Southern school of Ceylon. King Manuha possessed copies of the Tipitaka which had been left at Thaton by Buddhaghosa. He refused to give them up and so Anawrahta marched with an army to Thaton and overwhelmed it, returning with the scriptures and many captives. Thaton at that time was civilized and religious

---

(10) Dr. Htin Aung, Customary Law in Burma, Burma the Fifth Anniversary, Vol. III, No. 2, Jan. 1953, 65.

but unwarlike and totally unprepared.

Thus Upper Burma gained immensely by the conquest of Thaton; she gained Buddhism in the form which she finally adopted and has never since forsaken, Buddhism of the Himayana or Southern school from the Mahavihara in Ceylon. This was in 11th century and the Burmese became Buddhists in this form almost over-night (11). The Buddhism she had previously known, the Mahayana Buddhism from Northern India disappeared from Burma after this. Pali supersedes Sanskrit as the normal language of sacred books; the Burmese adopted the Talaing alphabet and wrote their own language for the first time, the earliest Burmese inscription known being dated 1058. There is ground for believing that Anawrahta sent to Ceylon for scriptures and compared them with those of Thaton (12). The latter half of the eleventh century A.D. witnessed the triumph of Hinduism over Buddhism in India, and even in Ceylon Buddhism was being subjected to attacks. It is recorded that the King of Ceylon sent for assistance to the King of Burma against the cholas of Sourthern India, and in A.D. 1031 asked for and obtained a deputation of monks and scriptures to strengthen the Buddhist religion, which had fallen on evil times. This shows that within fifteen years Hinayana Buddhism had taken firm root in Pagan. Large numbers of devout Buddhists, fleeing from persecution in

---

(11) Dr. Htin Aung, Customary Law in Burma, Burma The Fifth Anniversary, Vol. III, No. 2, Jan. 1953, 66.
(12) Reginald Le May, The Culture of South East Asia, 52.

Northern India, migrated to Burma and even to Siam (13). It may therefore be said that from this date arose the intimate connexion between the Kings of Burma and the great Buddhist centres of Bodhgaya in Bihar and Ceylon.

It has been shown that the rulers of places like Prome Pagan, and Thaton were Indians and hence Indian notions of common law might have prevailed. Kyanzitha, son of Anawrahta, who had proved his valour on many an occasion, and had set the seal on his and his father's greatness, received his greatest inspirations from eight Indian Buddhists in building the famour Ananda temple at Pagan which may be called the 'Westminster Abbey' of Burma. He had Indian features rather than Burmese as his mother was of Indian birth (14). It may be said that the Burmese were remarkably absorptive of the foreign settlers, and doubtless absorbed their legal notions without acknowledgment, being barely conscious of it. It may also be observed in this connection as Venkasami Row (15) has said,

"that when there are several systems of law, one very highly developed and the others either rude or developed in a less degree and there is contact between these systems, the highly developed system has the tendency to supplant the others. In the same manner where there are two civilizations

---

(13) Reginlad Le May, The Culture of South East Asia, 52.
(14) Ibid.
(15) V. Row, Tanjore Manuel, 149; see also G. Iyer, Hindu Law, 61.

in contact, people belonging to the inferior civilization have naturally a desire to become a part of the community possessing the superior civilization or at least to possess the superior civilization themselves. This they do by imitating the manners and customs of the people of the superior civilization and by borrowing and assimilating to themselves a great many distinctive features of the superior civilization."

It may therefore be stated that the tendency of the Burmese people of the 11th century was to adopt the customs, social as well as religious, of the Indians. This was the process by which the Burmese became influenced to laws of Indians. The introduction of the Indian civilization into Burma was the result of a gradual and peaceful progress of colonisation.

(3) <u>The Origins of Thesawalamai, Kandyan and Hindu Law.</u>

It has been shown that there was intimate connexion between Burma and India and Ceylon. Before showing the debt of Burmese Laws to Hindu Law, it will be necessary to consider the origins of Thesawalamai, Kandyans (Dravidian usages) and Hindu Law.

Thesawalamai is the law applicable to the 'Malabar inhabitants of the province of Jaffna'. Before it was codified, by the Dtuch, it was a customary law applicable to

the Tamils who inhabited the Jaffna district. It has prevailed in North Ceylon for several centuries, ever since that part was colonised by the Tamils, who migrated many centuries ago from Southern India (16). Recent researches have shown that the Thesawalmai originally was a collection of Dravidian usages. Mayne while considering the nature of the Thesawalamai says, (17) "The customs recorded in Thesawalamai may therefore be taken as strong evidence of the usages of the Tamil inhabitants of South India two or three centuries ago, at a time when it is certain that those usages could not be traced to Sanskrit writers." Mayne has shown that many such customary usages exist even today in South India. They may be found in 'The Madura Manual' by Nelson, "The Malabar Manual", by Logar, "The North Arcot Manual" by Cox, "The South Canara Manual" by Sherock, and "The Manual of Administration and Reports of 1871" by Dr.Cornish. In considering the Dravidian usages, Mayne says, "We also know that the influence of Brahmans or even of Aryans among the Dravidian races of the South has been of the very slightest, at all events until the English officials introduced their Brahamanical advisers."

Mayne has also ably shown that these Dravidian usages were not based on Hindu Law, but that on the other hand many basic principles of Hindu Law are based on these Dravidian usages. He says, (18), "On the other hand, while I think that

(16) H.W. Tambiah, The Laws and Customs of the Tamils of Jaffna, 2.
(17) Mayne, Hindu Law, 50; cited also in H.W. Tambiah's, The Laws and Customs of the Tamils of Jaffna.
(18) Mayne, Hindu Law (7th Ed.), 11.

Barhmanical Law has been principally founded on non Brahmanical customs so I have little doubt that those customs have been largely modified and supplemented by that law. Where two sets of usages not wholly reconcilable are found side by side, that which claims a divine origin has a great advantage in the struggle for existence over the other."

It is by its claim to divine origin that the Hindu Law modified Dravidian usage, and hence one finds undoubted traces of Hindu Law in Thesawalamai. But the roots of the Thesawalamai are not to be found in Hindu Law.

It has been shown by writers of eminence on Hindu Law that the Hindu Law is derived from the customary laws of India. Thus, Ganapathy Iyer says, (19) "It will thus be seen that the Hindu Law as ascertained in the code and other Sanskirt writings is not a myth but it is based on immemorial usage and that the Brahmanical writers never could have supplanted and none did supplant these usages by laws of their own fancy although they might have been instrumental in developing the law to suit the growing needs of the society of their time." Mayne says (20), "I think it is impossible to imagine that any body of usage could have obtained general acceptance thoughout India merely because it was included by Brahman writers or even because it was held by the Aryan tribes. In Southern India, at all events, it seems clear

---

(19) Ganapathy Iyer, Hindu Law, 36.
(20) Mayne, Hindu Law (9th Ed), 4; see also H.W. Tambias, The Laws and Customs of the Tamils of Jaffna, 6.

that neither Aryans nor Brahmans ever settled in sufficient numbers to produce any such result." In support of his statement he takes three distinctive features of the Hindu Law, viz. the undivided family system, the law of inheritance and the practice of adoption and shows how the early history of these branches of the law and their main features had nothing to do with Brahmanism.

Ganapathy Iyer, after a close analysis, takes the view that the Hindu Law, the Burmese Law, the Thesawalamai and the customary laws of the Punjab have a close resemblance. After considering the similarity between the Code of Manu and Burmese Law, he says, (21)

"The Burmese Law must have the same common source as the Hindu Law of the Aryans in India though the developments (owing to the influence of Buddhism) must have been on different lines. So also, the rules in the Thesawalamai, a compilation of Tamil customs made in 1707 A.D. by the Dutch Government of Ceylon, closely resemble the customary laws prevailing in the Punjab and traces of a common origin of the rules in the Thesawalamai and the Hindu Codes are easily discernible. According to the Thesawalamai a distinction is drawn between hereditary property, acquired property and dowry, which respectively correspond to ancestral property, self-acquired property and stridhanam of the Hindu Law

---

(21) Ganapathy Iyer, Hindu Law, 36.

although the incidents attaching to each of these may not all be the same under the two system. The heriditary property goes to the sons and the stridhanan to the daughters according to the Thesawalamai as under the Hindu Law."

Tambiah (22) has shown that there is a remarkable similarity between the Thesawalamai and the Marumakkatayam Law. He says (23), "The basic principles of their systems of law are so similar that we are forced to come to the conclusions that these laws are derived from some customary law prevalent among the ancient Dravidians. Father Hera's work on the Mohezo Dand inscriptions (24) shows that the civilisation of the ancient Dravidians was one of the earliest civilizations known to the world, and the culture of the Dravidian had spread through out India. Hence it is not surprising to find similar customary usages existing in South India, Ceylon and North India. Thesawalamai, in its origin, as stated earlier, was brought by the early Malabar immigrants to Jaffna and is an offshoot of the old Marumakkattayam Law." He further said (25) that owing to Brahamanical influence, the patriarchal system of society took a firm root among the Tamils of the Coromandel coast. Whenn the

---

(22) H.W. Tambiah, Laws and Customs of the Tamils of Ceylon, 126.
(23) H.W. Tambiah, Laws and Customs of The Tamils of Jaffna, 19.
(24) J. Marshall, Mohenjo-Daro and the Indian Civilization, Vol. I, 3.
(25) H. W. Tambiah, The Laws and Customs of the Tamils of Jaffna, 19.

Tamils of the Coromandel coast came over to Jaffna, they found that the people of Jaffna had their distinct usages founded on the matriarchal system of society, and those usages could not be changed in toto. A happy compromise was gradually effected; and in the law of Thesawalamai we find a curious blend of principles governing the matriarchal and the patriarchal system of society existing side by side. With the firm establishment of the patriarchal system of society we find the adoption of some of the principles of the Hindu joint family system. Thus, the rule in Thesawalamai is that 'so long as the parents live, the sons may not claim anything what so ever (26), but after the father's death, the mother is recognized as the head of the family till she marries again, when she passes into the agnatic family of her second husband. The latter rule is borrowed from Hindu Law (27). He concluded that the patriarchal system gradually displaced the matriarchal family and principles of the Hindu Law were gradually introduced to suit the changing conditions prevailing in Jaffna.

As for the Laws of the Kandyans, no Sinhalese jurisprudential literature exists other than the Nili Nighanduwa and sources such as Knox, Riberro, and a text book by Dr. Hayley (28). Dr. Derrett has done some research in the

---

(26) H.W. Tambiash, The Laws and Customs of the Tamils of Jaffna, 21.

(27) H.W. Tambiah, The Laws and Customs of the Tamils of Jaffna, 21; Compare Burmese Law.

(28) The Origins of the Laws of the Kandyans, University of Ceylon Review, July-Oct. 1956, 105.

Origins of the Laws of the Kandyans and has shown many points of similarity between the Kandyan Law and Hindu Law. He also refutes the commonly asserted connection between the Kandyan system and matriliny.

It is generally believed that Vijaya brought the first Sinhalese to Ceylon about the time of the Buddha. It seems that the Sinhalese were a people of predominantly non Aryan descent, with a way of life substantially identifiable as akin to that common in modern South India. About Sinhalese people, Dr. Derrett says (29),

"They might have known of Brahmans and Brahmanism, and had already made some attempt to reconcile native custom with Aryan traditions. But this process had not gone far. The customs which they followed were well known in Manu's day and in Kautilya's time, but they were a people on the very fringe of the orthodox world. In all probability they were averse to accommodating themselves to a completely orthodox set up, though this is pure conjecture, and their reasons for migrating from India can only be guessed at. The alacrity with which they added Buddhism to their Hindu-like cults seems to suggest that they were temperamentally averse to Brahman-worship, and they may well have been an unorthodox or heretical sect when they embarked, together

---

(29) The Origins of the Laws of the Kandyans, University of Ceylon Review, July-Oct. 1956, ~~105~~ 108.

with their retainers and followers, for the happy Island, where a very primitive people would be forced to make room for them. They were not highly literate, and it may be that their migration was as much due to economic pressure as to theological differences. We have yet to find out, but it can be accepted, so far as we have gone, that the ancesters of the Sinhalese were part of that great amalgam of peoples which grew up during the period B.C. 1500-500 and which continued in varying measures to grow throughout the Penninsula and the East, out of the fusion of Pre-Aryan with Aryan, an amalgam which has made the Indian civilization what it is." He further points out that the Sinhalese could have come from Orissa, for there is no very cogent proof that they did not. In modern Orissa the border between Dravidian and Aryan is patent, and Orissians feel that through their language separates them from their Dravidian Telegu neighbours their customs are more akin to those of the latter than to those of their Bengali neighbours on the other side (30).

As for Hindu Law, the oldest sources are the Vedas (1500-800 B.C.) and the most recent are details of caste or tribal customs collected in the nineteenth and early twentieth centuries. In between these limits lie the Dharmasastra texts (consisting of the mula, or root, which

---

(30) The Origins of the Laws of Kandyans, University of Ceylon Review, July-Oct. 1956, 105-6

is the collection of Sutras and ~~Smrtis~~ Smrtis, and of the commentatory body, partly in the form of straight-forward Vrtti ~~and~~ or Tikā on the text chosen for the purpose and partly in the forms of digests of selected smrti ~~aphorisons~~ aphorisms, or commentaries nominally upon a single continuous smrti-treatise but in reality in the shape of legal digests) and other (31) evidence of law in practice, such as inscriptions and collections or individual examples of legal documents. The age of the commentaries and digests is from 600 A.D. to 1795 A.D. There are inscriptions from the time of Asoka Maurya, but more substantially from about the fifth century A.D. Legal documents other than inscriptions are available from the 17th century.

The Institute of Manu is the earliest attempt among the Hindus to fix ancient customs and traditions in a systematic form. The Code is, at best, only a large collection of 'the usages of a peculiar tribe of the country' and a compendium of 'moral and religious duties and precepts to pious Hindus'. The original compilation of Manu must have suffered mutilations and interpolations, modifications and alterations at the hands of the glossators, and the later school of Brahmanism, as in accordance with the general principles of progress and advancement, the needs of the growing communities demanded. (32)

---

(31) The Origins of the Laws of the Kandyans, University of Ceylon Review, July-Oct. 1956, ~~105~~ 105.

(32) S.Ray, Customs and Customary Law in British India, 28.

"The Hindu Code, called the Laws of Manu", observes Sir Henry Maine, "Which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary Orientalists is, that it does not, as a whole, ,represent a set of rules ever actually administered in Hindustan. It is in great part, an ideal picture of that which, in the view of a Brahmin, ought to be law (33)." Again; "The codified law, Manu and his glossator embarced originally a much smaller body of usage that has been imagined, and, next, the customary rules, reduced to writing, have been very greatly altered by the Brahamanical expositors constantly in spirit, sometimes, in tenor" (34)

It is important to consider the influence of Brahmanism, which is of later development, on the then existing customs. History tells us that the first country in which the Aryans settled was the tract of land drained by the great river Indus and its tributaries. The holy land of Brahmavarta was, as described by Manu (Laws of Manu, Chap. II, 17), situated between the two ancient rivers, Sarasvati and Drisadvate in the Punjab, and this Brahmavarta, according to that sage, is the land where the custom handed down in regular succession

---

(33) H. Maine, Ancient Law, 17; 29. See also S. Ray, Customs and Customary Law in British India, 14.

(34) Village Communities, 52, 30

among the (four chief) castes of that country is called the conduct of the virtuous men' (Manu, Chap. II, 18). Manu further says, "from a Brahmin in that country let all men on earth bear their several usages." (Chap. II, 20). It is worth noticing that Manu has throughout his treatise enjoined unqualified reverence for, and implicit obedience to, the Brahmins, and placed them, as a class, above all other human beings. The Brahmans, armed with shastic injunctions, assured for themselves the position of sole interpretations of the vedas and shastras, and became the expositors of usages and customs both secular and religious and ultimately attained an ascendancy even higher than that of the rulers of the soil. It was through their influence that ancient customs and usages, which had originally been free from any religious significance or superstitions ideas, became clothed with all sorts of religious rites and superstition (35). But, however, there exists a large body of customs and usage, absolutely pure and untouched, amongst the indegenous population of India who were unaffected by Brahmanism. Even to the Punjab the birth place and cradle of Brahmanism, the ancient customs and usages did not suffer much change. Because, soon after the Aryans began to move further eastwards, the hold of Brahmanism slackened to a considerable extent. In Southern India also, the Brahmans never settled

---

(35) S. Ray, Customs and Customary Law in British India, 18.

in sufficient numbers to produce a lasting effect on existing customs and usages. Consequently, in Malabar, Canara, and among the Tamil inhabitants of the south of India, and the Nambudiri Brahmans on the West Coast of the Madras Presidency, certain peculiar usages and customs are noticed which remained uninfluenced by Brahmanism (36).

Therefore, the origin and nature of the Hindu Law were naturally affected by Brahmanism, and the picture of the Indian society was wholly dominated by sacrifices and rituals and it remained with most of the writers on Hindu Law throughout the last century (37). If, one, therefore tries to compare Burmese Law with Indian Code of Manu or Hindu Law, one will find that the two systems are different. The Hindu Law as propounded by Brahmanism of later period assumes the joint family as the unit of society. The law of the joint family is the basis of Hindu personal law; the law of marriage, of adoption, of inheritance, have all to subserve the purposes of the joint family and accommodate themselves to the rules governing the joint family. But if one compares with the ancient customs and usages of India, (i.e. pre Brahmanism period) and the Dravidians customs, one will find the law of divorce and the law of inheritance, in fact every branch of the personal law similar to Burmese Buddhist

---

(36) S. Ray, Customs and Customary Law in British India, 18.
(37) Mayne on Hindu Law and Usage, (1953) 9.

Law and assumes equality between the sexes, and the creation on marriage of a community of property between the spouses.

(4) Matriarchal Vestiges in Burma

We find a matriarchal organisation of society among tribes closely connected with Burman race - and it still exists in the North East of India. Furnivall thinks that Burman society was similarly organised at a comparatively recent date (38). Pure matrilinity is known to have existed at the latest in the 12th century along the Western Coast of India (Malabar), among certain castes who have certain characteristics in common. Amongst these the fishing communities were prominent and it is no coincidence that a matrilineal community, the Mukkuvas, continued that law until comparatively recent times in Ceylon (39). Matrilineal communities probably existed in Madras and elsewhere (40).

In such a system descent is traced and property transmitted through the mother only. The best example is offered by the Khasis, (Assam) who are of Tibeto-Burman stock. Sir J.C. Lyall said, "Their social organisation presents one of the most perfect examples still surviving of matriarch institutions, carried out with logic and thoroughness, which to those

---

(38) Journal of Burma Research Society, Part I (1911), 15.
(39) J. D. M. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review, July-Oct. 1956, 126.
(40) Ibid, 127.

accustomed to regard the status and authority of the father as the foundation of society, are exceedingly remarkable. Not only is the mother the head and source and only bond of union of the family; in the most primitive part of the hills, bhe Syntẽng country, she is the only owner of real property, and through her alone is inheritance transmitted ... The flat memorial stones set up to perpetuate the memory of the dead are called after the woman who represent the clan .... In harmony with the scheme of ancestor worship, the other spirits to whom propitiation is offered are all mainly female." (41)

Ethnologically these Khasis are closely related to the Burman race.

As the result of his analysis of the conditions of these people and of similar conditions in bygone civilizations, Dr. Frazer (42) indicates the following charateristics of the matriarchal organisation. The ultimate criterion is the tracing of kingship through the female line; as a corollary it follows that power and property are similarly transmitted; ancestor worship is of the female rather than the male, and there is therefore a tendency to the preponderance of goddesses in the heirarchy of deities. To the European, with

---

(41) J. C. Lyall, "Introduction to The Khasis, - quoted in the article of J. C. Furnivall", Matrichal vestiges in Burma, Journal of the Burma Research Society, Part I, (1911), 16.

(42) J. G. Frazer, Adoris Attis Osiris, 392-3.

instincts modified by a long patriarchal tradition, the sexual relations of such races appear to indicate a lax morality. It must be noted however that although the right to rule and to own property is transmitted through the female, actual power and ownership may be vested in the male. Thus a Khasi king inherits power in right of his mother, but he exercises it in his own person, and among the Melanesians " .... the house of the family is the father's, the garden is his, the rule and government are his."

The following are some incidents of Burma history and custom examined in the light of these results (43).

The allotment in the Dhammathats of an extra portion to the eldest (orasa) son is without doubt of patriarchal origin. In certain places however the custom still exists for the inheritance to be equally divided among all the children; but if the eldest son should bring a suit to obtain his legal share, it is probable that the law could give him a portion to which by local custom he was entitled.

The devolution of property is so frequent an incident of social life, and so peculiarly liable to be influenced by a foreign legal system, that we ought to expect to find vestiges of matriliny more amply illustrated in the rules for devolution of power. It is convenient therefore to start our enquiry by examining the rule of dynastic succession. The endogenic marriages of the Burman Royal house

---

(43) J. S. Furnivall, Matriarchal Vestiges in Burma, (1911), J.B.R.S., 15.

have frequently been noticed. Sir George Scott writes (44), "The Sovereign always marries at least one half sister to ensure the purity of the royal blood". Dr. Fra-zer, in the work already quoted, gives instances of a similar custom in early Egypt, where it appears to have been widespread, but points out that 'beother and sister marriage seems to have been especially common in royal families' (45) and adopts the theory of A. T. McLennon that it was a survival of the days when royal blood was traced through women only.

The chronicles of Burma lend support to this suggestion, for such a marriage is the development of a practice whereby the kingdom passed with the surviving queen. The Mon tradition of Thamara and Wimala is an example (46). In the volume of inscriptions no less than 5 queens were thus married to successive princes between the 13th and the 15th century (47). In all these cases, the political power, although held by men, was transmitted through women.

In the patriarchal organisation, it is the wife who goes to or become a member of her husband's household. The survival of matriarchal custom can be still traced in Burma, though obsolescent in places, of the bridegroom temporarily residing with the parents of his wife. "After marriage", says Shewe Yo, "the couple almost always live for two or

---

(44) The Burman, quoted in Matriarchal Vestiges in Burma, Journal of the Burma Research Society, Part I, (1911), 17.
(45) T. G. Frazer, Adoris Attis Osiris, 40, cited in J.B.R.S. (1911) 17.
(46) J.B.R.S. (1911) 18. (47) The Burman, Vol. I, 70.

three years in the house of the bride's parents, the son-in-law becoming one of the family (48). Furnivall points out that the practice of the son-in-law abiding with his wife's parents is an exogamic survival rather than a reflection of economic actuality. This is rendered more probable by his remaining on, if the girl be an only daughter, until the old people die, when in the ordinary course of things they inherit the property. Under a patriarchal system neither son-in-law nor daughter would have been able to lay claim to it; they would have been excluded in favour of the agnatic kin (49).

In this connection an instructive comparision is possible with certain Malayan villages. Here we read, 'tribal descent goes through the woman, and no land can be owned except by woman. Exogamy is still a real institution. The husband settles in his wife's village, essentially as a dependant on her and her relations. Thus in every generation the men are scattered, while the women of the village remain a solid compact group." (50)

We might expect to find other evidence of inheritance though the female line, but unfortunately it has never been collected. In Upper Burma, it has been noticed that the office of 'myothuggi' has frequently been inherited through the female line. The hereditary myothuggi are the best

---

(48) J.B.R.S. (1911), 18.
(49) J.B.R.S. (1911), 19.
(50) Socialist Review, March 1910. Where Woman is Master by T. O. May.

analogy to the hereditary twinzas. In the latter case the privilege of digging for oil rested with a certain number of families. These families are called Yoya families and every member of them was entitled to dig for oil. The 'yoyas' are divided into male and female yoyas. The title and right of the 'yoya' descend strictly in primongeniture, the male yoya being solely in the male, the female yoya in the female line (51).

There is some similarity between the Khasan marriage law (where matriarchal system exists) and the Burmese Buddhist Law. The Khasan marriage, like the Burmese Buddhist marriage is remarkable in its simplicity. Consent of the parties or of their guardians followed by the delivery of the woman to the husband form the essence of the transaction. No priest or public authority is needed to solemnize the marriage. The dissolution of marriage is quite simple and it is dissoluble by mutual consent (52).

Probably there may be other evidences, but it may be said as Dr. Frazer has pointed out, (53) "whereever the ancient preference for the female line of descent has been retained, it tends to increase the importance and enhance the dignity of women." Although, therefore, there are at present few traces of property being transmitted through the

---

(51) U Tha Gywe, A Treatise on Buddhist Law, Vol. I, 248.
(52) L.D. Joshi, The Khasa Family Law, 150.
(53) T. G. Frazer, Adoris Attis Osiris, cited in J.B.R.S. (1911) 20.

female line, the freedom of woman kind in Burma and their power over property may be fairly claimed as a result from the survival into the present times of ideas originating in a system of matriarchal.

However, it is possible to outline some general conclusions. In the first place there is considerable evidence that both Mons and Burmans were at one time organised on matriarchal lines. It is probable that among the Mons primogeniture with descent from father to son was beginning to assert itself at about the time when they first achieved a national existence in the 9th century. The Burmans would seem to have recognised no kinship with the father until some time after the Indian colonists had been established at Prome. Archaic rites, involving practices now regarded as immoral, would appear to have been in full force until the introduction of the 'Southern School of Buddhism'. Although these were gradually abolished there are many traces that former ideas still exerted an active influence on dynastic succession so late as the 15th century, and that from these originated modern ceremony whereby a king was married to his half-sister. As regards the common people, partly on account of the unceasing warfare, to which matriarchal institutions are unsuited, but principally

because of the influence of codes with a patriarchal basis, there has been a growing tendency for the father to acquire prominence at the expense of the mother (54).

(54) J. S. Furnivall, Matriarchal Vestiges in Burma, B.R.S.J. June 1911, 15 at 30.

(5) Marriage and Divorce

Comparision with Ancient Indian Law, Kandyan Law and Thesawalamai

1. Marriage.

It has been said, "there is no adequate reason to suppose that the marriage customs of Burma have been influenced, as regards essentials, by outside agencies, except in so far as they have been tinged to some extent with Buddhist moral teachings (55)." It is submitted that the above statement requires reconsideration. As will be indicated subsequently, Indian influence on Burmese marriage customs is manifest.

Marriage amongst Burman Buddhists has entirely lost any religious character it might have had and at the present day it is purely civil and consensual. Buddhist monks keep entirely aloof from such worldly ceremonies (56). The purpose of Buddhism being the annihilation of desire, there can be no room for a religious ceremony in Burmese marriage. In practice, however, certain ceremonies are usually observed (57). It is noteworthy that the Sinhalese also do not appear to believe that any magic is necessary in a marriage ceremony, and are prepared to regard as married a couple whose union was not solemnised by any ceremony (58). Although in India, marriage was regarded as a religious sacrament in the Vedic period,

---

(55) U May Oung, "Leading Cases on Buddhist Law", 70.
(56) S. C. Lahiri, Burmese Buddhist Law, 24.
(57) U.E Maung, Burmese Buddhist Law, 20.
(58) F. A. Hayley, Sinhalese Laws and Customs, 174.

divorce and re-marriage were permitted in exceptional cases. It was not until about 500 A.D. that marriage became an irrevocable union. In the Brahmanical counter attack on Buddhism, which emphasised other worldliness, the Brahman writers gave every mortal activity a religious significance, calling for the presence and active participation of a Brahmin priest (59). Manu's object was to ensure that a union was strengthened by religious rites, whether its origin was noble or shameful (59). Satyanarayana Rao, J. remarks, "Ceremonies are essential in the case of all the eight forms of marriage. This is the strict Hindu Law regarding the mode by which a valid marriage could be effected (60).

Some Dhammathats mention the eight forms of marriage, which shows the influence of Hindu Law. Thus Dhammavilasa (61) enumerates the following eight forms:

(1) The Brahma form of marriage is one where the bridegroom is selected for excellence of character; he salutes the bride's parents at the marriage ceremony.

(2) The Visaya form is one which takes place from business motive.

(3) The Kariya form is where presents such as cattle, etc., have been received by the bride's parents from the bridegroom.

(4) The Unmata form is where the bride's parents command

---

(59) A.S. Altekar, The Position of Women in Hindu Civilization, 43; J.M.D. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review, (1956), 109.
(60) Dev-Viva-Nai Achi v. Chidambaram, AIR (1954) Mad. 657 at 667.
(61) XIV, 80.

upright conduct to the bride and bridegroom.

(5) The Ayutan form is where the daughter is given in marriage after taking presents but without ascertaining whether the relatives of the bridegroom consented to the marriage.

(6) The Gandhabba form is where marriage takes place because of mutual love and affection between bridegroom and bride.

(7) The Byahitta is where the daughter is given in marriage without her consent.

(8) The Seyya form where the daughter given in marriage had already sexual intercourse with the bridegroom arising from living under the same roof or from some other cause.

The above may be compared with the eight forms in Manu(62). They were also known in ancient times among the pre-Aryan inhabitants of India (163).

(1) The Brahma where the father gives his daughter to a man learned in the Veda and of good conduct.

(2) The Daiva where the daughter is given to a priest who officiates at a sacrifice during the course of its performance.

(3) The Arsha where the father gives away his daughter after receiving from the bridegroom a cow and a bull of two pairs.

(4) The Prajapatya is where the father of the girl addressed the couple with the text, "May both of you perform together your duties" and has shown honour to the bridegroom.

(5) The Asura form where the bridegroom marries the bride after

---

(62) Manu, III, 20-42; L. Sternbach, Forms of Marriage in Ancient India & Oheir Development (1951) Bharatiya Vidya, XII, 62. (63) J.D.M. Derrett, The Origins of the Laws of Kandyans, University of Ceylon Review 1956, 109.

giving presents to her and her relatives.

(6) The Gândharva form is the voluntary union of a maiden and her lover.

(7) The Rakshasa is the forcible abduction of a maiden from her home; and

(8) The ~~Pi~~sakas Paisacha is where a man seduces a girl who is sleeping, intoxicated, or disordered in intellect.

Although Dhammavilâsa calls its form by different names except in two cases, viz. Brahma and Gandhabba, the forms are similar and come very much in the same order as in Manu.

The presentation of these forms in the two texts in tabulor form will facilitate a comparison.

Dhammavilâsa	Manu
1. °Brahma (excellence of Character).	1. Brahma (knowledge of Vèdas and good character).
2. Visaya (business motive).	2. Daiva (given to priest who officiates himself at sacrifice).
3. Kariya (cattle received as presents).	3. Arsha (cow and bulls received as presents).
4. Unmata (upright conduct commended).	4. Prajapatya (performance of duties commended).
5. Ayutan (presents to bride).	5. Asura (presents to bride).
6. Gandhabba (love match).	6. Gándharva (love match).
7. Byahitta (without consent).	7. Rakshasa (by force).
8. Seyya (seduction).	8. Pisakas Paisacha (seduction).

It would be absurd to argue that the authors of these texts arrived at these classifications by original and independent thought. Obviously one inspired the other or both derive from a common source. Manugye speaks of three forms, namely, the gift of girl by her parents, a union by mutual consent, and a union arranged by a go-between (64). In actual practice, only two of the three forms in Manugye, viz. the marriage arranged by the paretns, and the marriage by mutual consent of the contracting parties, are common. The Kandyans knew (and to some extent still know) marriage of a formal kind, in which the bride is given away by a relation together with a dowry, and marriage of an informal kind in which the girl, gives herself to a man of her own choice. The first form roughly coincides with the Brahma form of marriage described by Manu and other Smrti writers, and by Dhammavilasa (65); the other is identical with the Gandharva form, in which originally, at least, mutual attraction, once acknowledged by the parties, serve to establish the union. Satyanarayana Rao, J., observes (66), "There is nothing odious when two persons 'sui juris' man and woman agree to marry between themselves, and the choice was their own and not super-imposed by the guardian for the marriage, and make the union permanent by going through the marriage rites prescribed by the Shastras. The Gandharva form

---

(64) S.C. Lahiri, Burmese Buddhist Law, 25.
(65) J.N.D. Derret, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 111.
(66) Deivanai Achi v. Chidambaram Chettiar, AIR (1954) Mad. 657 at 665.

of marriage is not obsolete in the state of Madras." In Burma the love marriage without consent of parents is common; this corresponds to Gāndharva marriage.

In India, from the Vedic age, the Gāndharva marriages were well known. Authorities are not agreed as to whether love unions should be included within the category of approved marriages. The Bandhayana Dharma Sutra refers with approval to the view of some thinkers that love unions ought to be recommended as they presuppose reciprocal attachment (67). The Mahabharata in one place includes the Gāndharva union within the group of the approved marriages (68). Manu seems to be indecisive in the matter (69). Narada, too, declines to place Gāndharva marriage either among the approved or among the blameworthy forms and calls it Sandharana or ordinary. The definition of Gāndharva marriage is given by Kalidasa in his Sakuntala. When Kanva proceeds to express his approval to his daughter of her love marriage, he incidentally defines the Gāndharva marriage as a love union brought about without any recitation of Mantras (70). This corresponds to Burmese marriage by mutual consent of the contracting parties, though no ceremony is necessary for the validity of the marriage. In India, in course of times, as the hold of Brahamanism increased, Gāndharva ceased to be one of the ideal forms of marriage; it

---

(67) Bandhayana, 1, 11, 13, 7; see also A.S. Altekar, The Position of Women under Hindu Civilization, 42.
(68) Mahabharata, XIII, 14.
(69) Manu, III, 23-25.
(70) A.S. Altekar, The Position of Women under Hindu Civilization, 43.

was included in the list of unapproved forms. But, however, Gändharva marriages could not be altogether stopped (71). In medieval times the scheme of Manu was spoiled by the super-added requirement that every union must be solemnized by a ceremony if it is to be a marriage (72). Hence, it was laid down that even in Gändharva marriages the ritual should be performed (73). Satyanarayana Rao, J. observes (74), "There are really two essential elements necessary to constitute a valid marriage under Hindu Law according to Shastras; one is a secular, viz. gift of the bride or kandyadana in the four approved forms, the transferance of dominion for consideration in the 'Asura' form, and mutual consent or agreement between the maiden and the bridegroom in the Gandharva form. These must be supplemented by the actual performance of the marriage by going through the form prescribed by Gutiya sutras of which the essential elements are 'panigrahana' and 'saptapadi'. In the case of 'Rakshasa' and 'paisacha' forms also, there should be a marriage rite in the form prescribed by the Shastras. This is the religious element. Both the secular and the religious elements are essential for the validity of a marriage. The 'Gändharva' form of marriage is no exception to the rule."

In the Asura form of marriage, according to the Dharma-sastra (75) the husband paid a reasonable price in cash or kind.

---

(71) A.S. Altekar, The Position of Women in Hindu Civilization, 43.
(72) ibid. 43. (73) ibid. 43. (74) Devivanai Achi v. Chidambaram Chettiar, AIR (1954) Mad. 657 at 665.
(75) A.S. Altekar, The Position of Women in Hindu Civilization, 218.

Sometimes, the bridegroom agreed to serve his would be father-in-law for a number of years in lieu of the payment of the bride-price. In Burmese Law, we find similar provisions; thus the Dhammathats say, Kungyalinga

"If a daugher is given in marriage to a man on his promising to render some service, he shall obtain her only on the fulfilment of his promise." (76)

Mano

"The giving of a daughter in public to a man who has performed some difficult task for her parents, is a noble act."(77)

Vinicchaya

"If a daughter is promised to be given in marriage on the suitor undertaking to perform some difficult task, she shall be given to him on his accomplishing it." (78)

In Hindu Law, the theory of joint ownership could only be invoked to secure for her minor rights and privileges. It invested her with an absolute right of maintenance against the husband. The husband could not proceed on a journey without making proper provision for her maintenance and the household expenditure (79). This is also the position under Burmese Buddhist Law (80). Thus,

Pyu. "The husband shall make adequate provision for the maintenance of his wife when he goes on a journey, and the wife shall wait till he returns."

---

(76) Digest, II, sec. 45.
(77) Digest, II, sec. 46.
(78) Digest, II, sec. 46.
(79) Mit: on yaj, II, 52.
(80) Digest II, sec. 244, 247; see also Manugye Bk. V., sec. 14-16.

Kaingza. "A man shall make provision for the maintenance of his wife, children, and slaves before he starts on a journey.....

The Kandyans have always practised a third type of marriage which is not represented, except incidentally and in ambigious texts (81) in the Sastra. This is the so called 'marriage in binna'.

In Kandyan Law the binna married daughter lives upon or near the property either of both her parents or of that parent who has set her up in this marriage (82). Her husband vacates his position in his natural family to some extent, comes to live with and perhaps to assist the wife's parent or parents, but does not become an adopted son, having, in fact, a somewhat precarious tenure in his wife's family house. This is almost exactly what happens in the Illatom adoption of Madras, or more particularly Andhra State (83). Various steps might be taken to prevent the ancestral property from passing out of the family by reason of the absence of male

---

(81) Such as Manu IX, 127-130, 135; see also Dr. J.D.M. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 111.

(82) F.A. Hayley, The Kandyan Law, 193, 194, 197.

(83) Mayne, Hindu Law and Usage, 280-1;
The Malabar institution of the Sarvaswadanam marriage (sometimes described as an adoption) is comparable;
V.N. Subramanya Iyer, Mayne Hindu Law, 429,
Velayudham Pillai v. Nilakanthan, A.I.R., N.U.C. 1955, TRAV, Cochin, 1101.
J.D.M. Derret, Origins of the Laws of the Kandyan, University of Ceylon Review, 1956, 113.

lineal heirs, and of these the illatom method has attracted most respectable attention and is best known to the courts. The Dharmasastra itself relented in the face of the demand that a daughter should be entitled to retain her father's property for her sons, and should stay at home married, but not a member of her husband's family (84) and the result was the hybrid institutions known as the putrika-putra, which many medieval jurists thought was the sole justification for the admission of the daughter as an heir to her father (85). Many have seen the putrika as a reflection of the wife of the illatom - 'adoptee'; historically there is no doubt a connection, but the institutions are distinct. We find in Burma, the bridegrooms residing with the parents of his wife, 'after marriage', says Shwe Yoe, 'the couple almost always live for two or three years in the house of the bride's parents, the son-in-law becoming one of the family. If the girl is an only daughter she and her husband stay on till the old people die'. (86) This kind of marriage, according to the Dhammathat, is the vivaha form, in which the bridegroom is brought to the bride (87).

The other kind of marriage, according to the Dhammathat, is ávâha,[87A] and in this form the bride is brought to the

---

(84) Manu, IX, 127, 130, 135.
(85) Ibid.
(86) Shwe Yoe, The Burman, Vol. I, 70.
(87) Digest II, sec. 34.
(87A) Ibid.

bridegroom. It is similar to Kandyan marriage in diga form. The girl married in diga goes to her husband's house, adopts that house name, and becomes to all intents and purposes a member of her husband's patrilineal family (88). According to Dr. Derrett, it is misleading to refer to this type of marriage as 'patrilocal' since infact the couple might never reside with the bridegroom's father, yet it is helpful to this extent that children of a diga marriage normally 'belong to their father in the sense that they have a right to succeed to him on intestacy and to be represented in such a succession by their own issue by a diga marriage (89).

In both Kandyan and Burmese Law in the choice of a husband for the daughter the father's decision must prevail. The father is the head of the family and control his children in the same way as he controls his wife. If the father and mother disagree regarding the suitability of a bridegroom (90), the mother must give way.

The Dhammathats are conspicuously silent about the prohibited degrees for marriage. The rules laid down in Major Spark's Code recognise but few prohibited degrees, and, it is difficult to cite an authority for them. They do, at least, reflect Burmese practice in this matter. Likewise, the prohibited degrees among the Sinhalese are remarkably few (91).

---

(88) F.A. Hayley, Kandyan Law, 193. (89) Dr. J.D.M. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 111-12. (90) F.A. Hayley, Kandyan Law, 194; Manosara, 103.
(91) F.A. Hayley, Kandyan Law, 178-84.

Although the Dharmasastras and the Dhammathats seem to have endeavoured to the husband's right to marry again during the subsistence of a prior marriage, by requiring that he settle a special fee upon the first wife or superseded wife (92) or that he should seek her consent except where she is suffering specified defects, the fact remains that polygamy was regularly practised by many classes, both among Hindus and the Burmese people.

Thus, Apastamba says that a man may not take a second wife if his wife bears sons; (93) and Manu's text (94), "Having thus at the funeral given the sacred fires to his wife who dies before him, he may marry again and again kindle (the fires)", may be interpreted to mean that a man may only marry after the death of his first wife. But elsewhere Manu (95) suggests that a second wife may be taken if the first was barren, diseased, or vicious.

Likewise, Manugye (96) implies that it is only under special circumstances that a husband can take a lesser wife in opposition to his head wife's wishes.

Manugye says, "The following are the five classes of wives who may be put away, namely;

(1) A wife who has not given birth to any child even after eight or ten years of wedded life,

---

(92) P.V. Kane, The History of Dharmasashtras, ii, 550-554.
(93) Digest II, sec. 219, 232, 265-7, 311.
(93) II, 5, 11-13. (94) IV, 168.
(95) IX, 77-82. (96) Digest Vol. II, sec. 219; Manugye Bk.XII, sec. 43.

(2) A wife who brings forth eight or ten daughters in succession and no son,

(3) A wife who is afflicted with leprosy, gayingyi (a kind of leprosy) or epilepsy,

(4) A wife who breaks the customary rules of conduct, and a wife who has no love for her husband.

'Putting away' does not mean that the husband may take all the property and put the wife away, but that he has the right to take another wife if he so wishes, and the wife has no right to protest.

In re Mg. Hme v. Ma Sein (97) a Full Bench of the Chief Court of Lower Burma laid down the rule that, subject to the exceptions of the kind mentioned in sections 219, 232, 265-7 and 311 of U Gaung's Digest (98), a chief wife, whose husband without her consent takes a second wife, is entitled to a divorce.

But there are texts in both Hindu and Burmese Laws apparently sanctioning unlimited polygamy.

Manu says, (99) "For the first marriage of twice born men, (wives) of equal caste are recommended; but for those who through desire proceed (to marry again), the following females (chosen) according to the direct order (of the castes) are more approved."

---

(97) (1918) 9 L.B.R. 191 (F.B.).

(98) These sections permit the husband to take a second wife if the first wife is, inter alia, barren or if she bears only daughters or is afflicted with leprosy or a similar disease, or if her conduct is immodest.

(99) Manu, III, 12.

Kaingza says, (100) "A man may marry as many as ten wives if he can maintain them all by his own skill and labour. Although his parents may give him in marriage to another woman after he has already been married to one, the parents of the first wife shall not recover her."

In Burmese Law, although a number of specified relations are empowered as marriage-guardians to give a girl in marriage, (101) none but her parents have the right to separate her from her husband, or to require her to divorce him for want of parental or guardian's consent (102). In Kandyan Law, the parents, and only after their death, her nearest male relations can remove her from a husband of whom they do not approve(103). The difference in Burmese Law is due to Buddhist influence. According to Buddhist scriptures (104) only the parents have the duty to arrange marriages for their children, and it is therefore consistent with Buddhist ideas that only the parents have the duty to arrange marriages for their children, and it is therefore consistent with Buddhist ideas that only the parents have the right to separate their minor daughter from the husband she has married without their consent.

---

(100) Digest, Vol. II, sec. 253.
(101) Digest, II, sec. 71
(102) Digest II, sec. 100, 145 and 146.
(103) F.A. Hayley, Sinhalese Laws and Customs, 186.
(104) Singalovada Sutta, para. 24, 9.

(2) Divorce.

It has been said that 'Marriage may easily be dissolved by Burmese custom and contracted again with great facility'(105) It is generally believed that the Hindu Law, unlike Burmese Buddhist Law, knew no such thing as divorce. This is because the Dharmasastras of medieval times followed the text of Manu which apparently deny the validity of divorce (106), and is a distorted view of the matter. A careful study of Manu himself and of Nārada (107), and the legal portions of Kautilya reveals that the widest liberty prevailed in classical times (108), and that the Dharmasastra writers undertook the heavy task in attempting to reform society by frowning upon it. Hence, Dr. Derrett says, "Successful in bringing the public to believe that ceremonies were necessary to constitute a valid marriage, it has not yet succeeded in persuading Hindus that divorce is immoral. The Hindu Marriages Act of 1955 retains customary divorces which since the remotest times have been extremely common among all but the highest castes." (109)

Under Burmese Buddhist Law marriage is dissolved (i) by mutual consent, (ii) unilaterally, on the surrender of all the

---

(105) Ma Gyan v. Mg. Su Wa, (1897-01), 28.
(106) J.D.M. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 117.
(107) P.V. Kane, History of Dharmasashstras, Vol. II, 169.
(108) J.D.M. Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 117.
(109) ibid. 118.

joint property by the party desiring divorce when the other is without fault and does not consent; (iii) by desertion or other matrimonial fault. (110) We find similar provisions in the ancient Indian Laws.

No doubt the later Dharmasastra literature (2oo-1200 A.D.) as a whole, while permitting the husband to remarry during the life-time of the first wife, refuses the remedy of divorce to the wife, even when completely forsaken by the husband (111).

If, however, we examine carefully the earlier Dharmasastra literature, we find that divorces were permitted before the beginning of the Christian era under certain well-defined circumstances (112). It is interesting to note that even Manu himself observes that a wife is not to blame if she abandons a husband who is impotent, insane or suffering from an incurable or contagious disease (113). This abandonment of the husband in certain circumstances amounted to a divorce, for Manu permits such a wife to remarry if her previous marriage was not consumated (114). The children of the new union were legal heirs to their parents. In actual practice, however, down to about the beginning of the Christian era, divorces and re-marriages took plade (115). The Atharvaveda in one place refers to a woman marrying again (116) very probably in the

---

(110) U Tha Gywe, Treatise of Buddhist Law, I, 97.
(111) A.S. Altekar, The Position of Women in Hindu Civilization, (1956), 83. (112) ibid. 83.
(113) Manu IX, 79. (114) Manu IX, 175-6.
(115) A.S. Altekar, The Position of Women in Hindu Civilization, (1956), 84.
(116) ibid, 84; Atharvaveda, IX, sec. 27-8.

life time of her first husband; it lays down a ritual intended to unite her permanently in heaven with her husband. Her second marriage of course presupposed a divorce. Dharmasutra writers between 400 B.C. and 100 A.D. lay down that, before re-marriage a Brahmana woman should wait five years, if her husband has gone away on a long journey; Kautilya reduces this period to ten months only (117). If the husband did not return within that time, and she was unwilling or unable to go out to join him, she should regard him as dead and unite herself with another member of the same family or gotra (118). Similar permission is given by the Arthasastra of Kautilya which requires judicial permission before contracting the second marriage (119). Jurists differ only about the period of waiting, which however never exceeded eight years. Similar provisions are found in the Dhammathats. Thus Pyu says,

"The husband shall make adequate provision for the maintenance of his wife when he goes on a journey, and the wife shall wait till he returns. If he does not make such provision she shall wait six years maintaining herself by honest means". It is noteworthy that, while other Dhammathats disagree about its duration, the waiting period never exceeds eight years (120).

Kautilya gives detailed rules of divorce intended for the couples who find it impossible to live with each other. They

---

(117) IX, s. 27-8. (118) A.S. Altekar, The Position of Women in Hindu Civilization, (1956), 84; Vasishtha Dharmasutra, XVII, 67. (119) III, 4. (120) Digest II, sec. 244. Vilasa- 8 years; Dhammathkyaw- 8 years; Rajabala- 8 years.

were, however, applicable only to marriages in the Asura, Gandharva, ~~Kshatra~~ Rakshasa and Paisacha forms. These marriages, though common among the lower sections of society, were not unknown among Brahmanas and Kshatriyas; divorce therefore must have prevailed among higher classes also to some extent (121). According to Kautilya, if the husband or the wife hated each other, divorce was to be granted. If a man, apprehending danger from his wife, sued for divorce, he had to return to her whatever presents he might have received at the time of marriage. If the wife was the petitioner, she had to forfeit her proprietory rights in her husband's family (122).

Recorded cases of divorce are met in Buddhist literature. The Dhammapada (123) mentions the case of a woman named Kana, who refused to return to her husband, when she learnt that he had contracted a second marriage during her absence. At the request of the Buddha, she was taken in adoption by a certain King, who married her to a nobleman.

In India, owing to the expanding influence of ascetic ideals, opposition to widow re-marriage began to increase from 200 A.D. (124). Vishnu recommends celibacy to the widow. Manu lays down that a widow should never even think of re-marriage after the husband's death (125). Narada says, (126)

---

(121) A.S.Altekar, The Position of Women in Hindu Civilization, (1956), 85. (122) III, 3. (123) Vol.II, 109.
(124) A.S. Altekar, The Position of Women in Hindu Civilization, (1956), 153.
(125) Vishnu, V, 157.
(126) Narada XII, 97.

"When the husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has been expelled from caste: these are the five cases of legal necessity, in which a woman may be justified in taking another husband." The famous emperor Chandragupta Vikramaditya, (375-414 A.D.), who was probably a Vaisya by caste, had married his elder brother's wife after the death of her husband, Kumaragupta, a son of this union, became an heir to the Gupta empire (127).

It may be pointed out that divorce and remarriage of widows only disappeared in the higher sections of Hindu society. The Sudra-kamatakara, written in the 17th century, expressly permits it to Sudras and other lower castes (128). In the

---

(127) A. S. Altekar, The Position of Women in Hindu Civilization, 153.
(128) ibid, 154.
In Who are Sudras?, Dr. Ambedkar says, the sudras ranked as part of the Ksatriya Varna in the India (Aryan society). There was a continuous feud between the Sudra kings and the Brahmanas in which the Brahmanas were subjected to many tyrannies and indignities. As a result the Brahmanas refused to perform the Upanayana of the Sudras and thus became socially degraded, fell below the rank of Vaisyas and thus came to the fourth Varna.

Karamarkar in the Bhandarkar Annals, Vol 30, 1949, 158, says, it is just probable that the Sudras were a non-Aryan tribe; and that some of the members of this tribe must have been allowed to join the early caste-system. The later vedic Brahamanas seem to have developed the habit of applying the non-Aryan name "Sudra" to all those they hated.

middle of the last century the Panchayats of several castes in Gujarat used to grant divorce. The Bombay High Court originally recognised this right but later on pronounced the custom as invalid on the ground of its being opposed to the spirit of the Hindu Law (129). In actual practice, at present, divorce is not difficult to obtain in the lower sections of Hindu society (130) particularly in South India (131).

The Kandyan Law retains the ancient principle of freedom of choice of partner, and divorce, even without grounds, was regularly permitted without any formalities. In Burmese Buddhist Law there is a kind of divorce known as jobye-nanbye divorce or sham mutual consent of divorce (132). In order to get rid of illness or another ill-luck, a temporary sham divorce is effected for a specified time. When the stated time is over the couple resume cohabitation without a formal re-marriage (133). The same custom existed in Kandyan Law. The wife could leave her husband temporarily to get rid of illness or other ill luck.

---

(129) A.S. Altekar, The Position of Women in Hindu Civilization. 87.
(130) ibid, 87.
(131) The Kamnas of Andhra; P. Parandhamayya v. Sikhamani, A.I.R. (1949) Mad. 825; divorce among the Kallans and Kunnuvans of the Madura Dist. as described in Neslon, Madura Country, 34-5, 50-1, is strikingly similar to that described in Burmese Law.
(132) F.A. Hayley, Kandyans Law, 195-6.
(133) U May Oung, Buddhist Law, 70;
S.C. Lahiri, Burmese Buddhist Law, 77.

without intention to dissolve the marriage permanently (134). Joint acquisitions during coverture were equally divided and the wife could take away her dowry (135). Her rights to objects given to her by her husband depended upon which spouse was responsible for the breaking of marriage. As in Burmese Law, careful provisions were made for custody of the children (136).

We have surveyed a considerable part of the Burmese Law of marriage and divorce and it may be said that a strong similarity exists between the ancient Indian Laws. The Dhammathats contain rules which obviously are adoptation of modern Hindu Law; but these are few and far between compared with the bulk of the law which bears no relation to the Dharmasastras. The original Burmese writers must have had acquaintance with Dharmasastras texts and adopted such parts of them as were applicable to the Burmese system. It may be said that the principal source of Burmese Law so far as marriage law is concerned, is the customary law of South East Asia including ancient India.

---

(134) F. A. Hayley, Kandyan Law, 195.
(135) ibid, 287.
(136) ibid, 287-9.

(6) The Property of the Marriage:

Comparison with Ancient Indian Law.

The distinguishing feature of the law of marriage in Burmese Buddhist Law is the community of property between the spouses. The rights of the spouses in the property of the marriage are of primary importance in this chapter of the law. Either party may have brought property to the marriage, and each may have acquired property. As soon as the marriage takes place, the husband has control over the property brought to the marriage by the wife and himself, even if he himself has not brought any property and the wife ceases to have any control except in the capacity of his agent from the date of the marriage (137). While the husband has control of his wife's property, the wife has no control over her husband's or over the joint property. She gets only what her husband expressly gives her out of the joint property. She is not entitled to incur household expenses without his permission (138). Under Burmese Buddhist Law, the spouses married in any form mutually inherit to each other being invariably the principal heir (139). The Dhammathats contain a number of rules governing the giving and taking of presents as a consideration for marriage. The acceptance of presents by the birde's parents sets a seal upon the contract to marry. If the marriage does not take place,

---

((137) Dhammavilâsa XIV, 89.
(138) Manussika, 49.
(139) Dhammavilâsa XIV, 81.

the presents have to be disposed of according to rules which vary with the cause of the failure to marry. Bridal presents play such an important part in Burmese marriages that a marriage without giving and taking of bridal presents is almost inconceivable. The parents are entitled to refuse to give their daughters in marriage to a bridegroom who does not bring them any presents. (140).

Since Forchhammer wrote his prize essay, stressing the Indian origin of Burmese Law, many writers have been disposed to accept his thesis, though without discussing the question. Some Burmese writers have, however, rejected it out of hand, though their attitude does more credit to their patriotism than their scholarship. Prof. Lingat has recently re-examined the problem, and takes a position between those adopted by his predecessors.

The gist of Prof. Lingat's (141) argument is that, given the information we have upon customary law in Indo-China, Siam, and Burma, obtained from their medieval codes, records of customary usage and the decrees of courts thereupon, we are in a position to affirm that in contrast to India whose cultural influence extended over the greater part of South East Asia on the one hand and to China which in Viet Nam exercised not only cultural influence, but also political and military control,

---

(140) Wagaru, II, 31.
(141) in Les Regimes Matrimoniaux Du Sud-est de L'Asie. See also Review of the above book in Journal of the Royal Asiatic Society 1957, Parts 3 and 4, 238.

the countries of South East Asia which came in various measures under their very different types of influence, developed institutions of fundamental importance found in neither of these two great civilizations, one of which was the community of goods between spouses. This development, aided by religious doctrines in the Southern and Western regions of the area, but firmly discouraged by political theories and legislation in the North, is, he argues, bound up with the basic ethnological fact that, whereas the Indian and Chinese civilizations were politically, ethically and socially autocratic, patriarchal, and, in different ways based on the fundamental assumption that the large joint family is the social unit, the civilization of South East Asia inherited from a not-so-remote migratory past the concept of the small family, the husband and wife and their children as the social unit. He feels that it is no coincidence that to find the closed counterpart of the 'community' system of pre-Revolutionary France one should have to go to Viet-Nam or to Cambodia; the basic facts of human nature and of political heritage have determined the similarity.

But, the mystery is still not solved. The evidence made available by Prof. Lingat calls for a fresh consideration of the too facile assumption that Burmese Law derives from the Dharmasastras. That they influenced the law of South East Asia is admitted, though Prof. Lingat would have it that their influence was, for the most part, in regard to form rather than substance. There

is, however, evidence from India and Ceylon which suggests that before a final conclusion can be reached, that evidence must be carefully weighed. The Tamils of Jaffna were never Buddhists and they were ruled as autocratically and as patriarchally as ever were their cousins. Yet among their customs ample traces of a communio bonorum are still to be found, right on the doorstep of the country where, according to Prof. Lingat, such an institution could neither have developed nor been received.

It is submitted that in searching for the origins of the institutions of the law of South East Asia the legal history of India may be more significant than appears at first sight. Egger observes, "The most distant view of the Indian state is obtained in glimpses through the ancient religious books of the Aryan settlers who evicted the Dravidians from the fertile plains of the Indus and Ganges. The Vedas and later epic writings show that the Dravidians had already established a civilization with cities and kings, and it is reasonable to assume that there were laws of India older than the Aryans. We can only guess at what happened in olden days." (142)

Whereas the Aryans were patrilineal and patriarchal, worshippers of ancestors and of ancestral deities, having many points of similarity with the Chinese, the pre-Aryans of India had an entirely different outlook upon the family and upon the position of women. Among the Dravidians the son tended to form

---

(142) The Laws of India and Burma, 1.

a separate household on his marriage and his wife brought with her a substantial contribution to the property of the new home. The children were as much related to their mother's as to their father's kindred. In early times it was taken for granted that marriage meant partition from the father's family, that man and wife were one in financial matters, at least until their divorce, which everyone knows was an easy affair as in Burmese Law. The sanskirt texts reflected aspects of this. Dampatyor madhyagam dhanam (wealth is common between spouses)(143) is probably not Vedic. It is probably the basis of a communio bonorum between spouses which survives in Burma, among the Tamils of Jaffna (it is unlikely that the institution there is due to Dutch influence), and (at any rate with reference to rights arising on a divorce) among the Kandyans. The Dharmasastra knew such a community and Apastamba distinctly says that no division takes place between husband and wife; they are joint as to religious ceremonies and spiritual rewards and with respect to the acquisition of property. That is why, it explained, a wife is not supposed to have committed theft by having made over an occassional gift of her husband's property while he is on voyage (144). Haradatta commenting upon these passages in medieval times, when the maxim quoted above had been practically confined to spiritual matters, seems entirely to accept the

---

(143) J.D.M. Derrett, An Indian Contribution to the Study of Property, B.S.O.A.S., Vol. XVIII (1956), 475.

(144) Apastamba II, 6, 14, 16-20, II S.B.E., 136-7; this point is repeated in Apastamba II, 11, 29-3; ibid, 170.

literal interpretation (145). The nearest parallel is also given by Apararka on Yajñavalkya (146). He refers to the community of property between husband and wife and hence explains the reasons why the wife gets ownership in her husband's property; a wife cannot stand surety for her husband because of their community of property. The concept of community has been referred to in many cases. For instance, "A wife is, under Hindu Law, in a subordinate sense a co-owner with her husband; he cannot alienate his property in such a wholesale manner as to deprive her of maintenance" (147). It seems that, according to the notions of the Hindu Law givers a wife acquired, from the moment of her marriage a co-ownership in her husband's property (148). Under the indigenous Hindu Law a woman by reason of being the lawfully wedded wife of her husband acquired from the moment of her marriage a sort of co-ownership to her husband's properties (149). The contention urged on behalf of the appalent in Muthalmmal v. Veeraraghavar Nayudu (150) is that, according to Hindu Law givers, originally the wife and husband had common ownership of property and her right to maintenance is traceable to that ownership. It is by subsequent evolution that the ownership in the property has ceased to exist and in

---

(145) Haradattas Ujjvala, Poona, 1932, 178.
(146) Apararka on Yajnavalkya II, 52.
(147) Jamma v. Machul Sahu, (1879) I.L.R. 2 All. 315.
(148) Indu Bhusan v. Mrityunjoy Pal, I.L.R. (1946) Cal 128 at 132.
(149) Kamalabala Bose v. Jibar Krishna Bose, A.I.R. (1946) Cal. 461 at 463.
(150) (1952) 2 M.L.J. 344 at 345.

its place a maintenance right has been substituted. The nature of the claim is thus described in Apastamba's Dharma-sastras quoted at page 234 of Golap-chandra Sarkar Sastri's Hindu Law, 8th Edition:

"There is no partition (or separation) between husband and wife because from the taking of hand (marriage) companionship (or jointness, of husband and wife) in (religious) acts is ordained; likewise in the fruits of (acts of) spiritual merit; and also in the ownership of wealth since (Manu and other sages) do not declare (the communion of the offence of) theft, in the case of necessary gift (made by a wife, of her husband's property). (151)"

The question how far a husband or a wife is guilty of theft for taking each other's property, has been some times raised. In a case decided before the passing of the Indian Penal Code, it was held that a Hindu husband could not be convicted of robbing his wife, she being according to law completely under his control (152). It clearly shows that the court recognises the existence of the community of property between husband and wife, for the wife's possession is his possession and she holds the property on his account.

Other commentators like Yajnavalkya, Jimutavahana (the founder of the Dayabhaga school) and Brihaspati were quite familiar with the above texts. It may be pointed out that the

---

(151) Muthalammal v. Veeraraghavar, Nayudu, (1952) 2 MLJ 344 at 345.
(152) Ootumram Atmaram, Morley's Digest Vol. I, 129; see also Banerjee, Hindu Law of Marriage and Stridhana, 135.

Upanishadic sage Yajñavalkya divided all his property between his two wives when he renounced the world. It is notorious that Yajñavalkya and his disciples were always more favourably inclined to recognise woman's rights than other jurists (153). A writer of the 6th century B.C. observes that it is customary for the Southerners to recognise the proprietary rights of women (154). Among the champions of widow's rights the domicil of Brihaspati, Vyāsa and Prajapati is not known, but Yajnavalkya was a southerner, and his commentator Vijnanesvara hailed from the Deccan. That the widow's right of inheritance, so enthusiastically advocated in the Mitakshara, was actually recognised in contemporary Deccan can be proved from epigraphical evidence. An inscription from Tanjore district, declares that a lawfully wedded wife inherits the whole property of the husband including land, cattle, slaves, jewels and other valuables (155). The Deccan was more advanced in this respect than northern India (156). Women were taking an active part in the administration in the Deccan even as governors of districts and towns (157). Hence, Yajñavalkya's advocacy of

---

(153) A.S. Altekar, The Position of Women in Hindu Civilization, 253.
(154) ibid, 258. (155) ibid, 253. (156) ibid, 258.
(157) ibid, 185-87; there was a proposal in the Ramayana to offer the crown to Sita when Rama was banished to the forest. It could not materialise owing to Sita's determination to accompany her husband in his banishment. In Orissa when King Lalitabharamdeva and his son died towards the end of the 9th century A.D., the widowed queen mother was requested by the feudatories to accept the crown. In compliance with their requests, we are told,

(contd.)

the widow's right as an heir was not as revolutionary as is sometimes suggested,,because since time immemorial the Dravidians recognised the community of property between husband and wife and equality of status between the spouses. It is, therefore, not supprising to see that the Burmese woman has never been a mere chattel at the disposal of her husband (158). Brishaspati pointed out that the husband and the wife are the joint owners of family property and together constitute one legal personality. A man therefore cannot be said to be completely dead as long as his wife is alive. How then can property pass on to another in the life time of the widow?(159)

---

(157) continued from last page.

she ascended the lion throne like Kalyarpani and ruled till the birth of a grandson (J.B.V.R.S. II - 422-23). Queen Didda of Kashmir ruled that state for twenty-two years, not as a regent, but as a full sovereign. The founder of the dynasty Chandragupta I, was ruling the kingdom jointly with his Lickhair queen Kumaraden. The names and effigies of both the king and the queen appeared on their coins, along with the name of the Lickhair clan from which the queen was descended. In the second century B.C., queen Nayanka was at the head of the administration of the extensive Satavahana empire of the Deccan during the minority of her son.

(158) Under the Burmese Kings, women held high offices and served often as headmen, chieftains and queen. (Dr. Hkin Aung, Customary Law in Burma, Burma, The Fifth Anniversary, 61 at 66.)

(159) Quoted in Dayabhaga, see XI, and A.S. Altekar, The Position of Women in Hindu Civilization, 256.

Vriddhamanu points out that the widow can offer funeral oblations to her husband, and so she should be allowed to inherit his property (160). To remove any doubt in the matter, Prajapati lays down that the widow has a natural right to inherit all her husband's property, including moveables, immoveables, bullion, ornaments, stores, etc. Her right is not in the least affected even if her elderly relations, male or female,,are alive. She will of course show them proper reverence, but hold the property in her own possession. If any male relation obstructs her peaceful enjoyment of the estate, it is the bounden duty of the king to punish him as a thief (161). It is perhaps Jimutavahana, who argues the widow's case in the most masterly fashion. 'There is no authority to hold the ownership in the husband's property, which the wife acquires at the marriage, terminates with the husband's death. How then can it be argued that the wife's right is destroyed the moment she is widowed? Nor can it be maintained that she is to utilise just as much of the income as may be necessary for her bare maintenance. (162) Jimutavahana, would not include inherited property in the wife's stridhana, because he wished to avoid the opposition of Bengal society to his revolutionary proposal to make the widow an heir to her husband, even when

---

(160) Mitakshara on Yajnavalkya II, 135-6; A.S. Altekar, The Position of Women in Hindu Civilization, 256.

(161) Quoted in Parasaramadhava Vol.III, 536; A.S. Altekar, The Position of Women in Hindu Civilization, 256.

(162) A.S. Altekar, The Position of Women in Hindu Civilization, 256.

the latter was a member of the joint family at the time of his death. While anxious that every widow should inherit her husband's share in the joint family property, he wanted to prevent it from going outside the family to the wife's stridhana heirs. He therefore did not claim it to be part of her stridhana (163).

The Dayabhaga law undoubtedly marks a further step in the expansion of the widow's rights. It lays down that the widow can get her husband's share in the family property, even if he happened to be a member of the joint family at the time of his death. He points out that there is nothing further to prove that the wife's co-ownership in the husband's property that arises at the marriage, automatically terminates at his death, if it happens while the family is still joint. It is therefore but fair that she should be allowed to inherit her husband's share irrespective of the consideration as to whether he had separated from the joint family or not (164). A community at Bezewada established, according to South Indian inscription, a rule that ~~none~~ no one should take the jewels of deceased woman except her husband (165). It supports the view that Jimutavahana knew of the existence of the custom in the south that husband and wife are heirs to each other.

The theory of the joint ownership of the spouses in the property of the marriage, pressed to its logical conclusion,

---

(163) A.S. Altekar, The Position of Women in Hindu Civilization, 261
(164) ibid, 261-62.
(165) South Indian Inscription X, No. 221, 114.

would have involved placing the husband and wife on an equal footing for most purposes, but this theory was opposed to the general patriarchal principles of the Hindu Law, so that the Hindu jurists were generally not prepared to support such claims on behalf of the wife. Generally social circumstances in the Indian subcontinent were unfavourable to the theory of joint ownership being utilised to invest the wife with full powers and rights which would logically follow from it. Landed property was for a long time owned either by village communities or by large undivided patriarchal families. Inevitably the texts to which the jurists gave publicity and support were such as that wives like sons and slaves, could own no property. The Privy Council, therefore, observed in Janaki Ammal v. Narayanaswami (166), "Her right is of the nature of a right of property; her position is that of a owner; her powers in that character are however limited."

However, if the texts, on which Jimutavahana had relied, had been utilised to their fullest capacity, they would have easily enabled him to declare that the estate which the widow inherits is an absolute and not a limited one. The widow is the living half of the husband, says Brihaspati, and therefore no one can get the right to inherit the deceased's property so long as she is alive. Now Jimutavahana could have easily

---

(166) (1916) 43 I.A. 207 at 209.

argued that the powers of the surviving half (the widow) can not be less than those of the expired half (the husband) and so the widow's estate would be as absolute as that of her husband, she having the power of sale, mortgage or gift. He however did not take this step, presumably because he despaired of it gaining acceptance among his contemporaries. The early jurists like Vishnu and Yajñavalkya, who recognised the widow as an heir, no where used any expression indicating that they regarded her as a limited heir. It is therefore possible that they regarded her as invested with the same full powers of disposal as they recognised as belonging to other heirs like the son, the father or the brother, whom they mentioned along with her. In the long discussion of the subject in the Mitakshara, Vijnanesvara nowhere states or hints that the widow was a limited heir, having no right to dispose of the corpus of the property (167).

Stridhana, it its origin in the Brahamanical code, was virtually connected with the custom of the bridegroom to pay a brideprice to the bride's parents. Owing to the affection, which parents naturally felt for their daughters, they used to give part or the whole of the bride price to the bride, to be enjoyed by her as her separate estate during her own life (168). In the Asura form of marriage, the husband paid a

---

(167) A.S. Altekar, The Position of Women in Hindu Civilization, 262.
(168) ibid, 218.

bride price in cash or kind. Sometimes, the bridegroom agreed to serve his would be father-in-law for a number of years in lieu of the payment of the bride-price, as in Burmese Law (169).

Manu is the earliest writer to give a comprehensive description of stridhana. According to him it consists of six varieties; the first three are gifts given by the father, the mother and the brother at any time; the fourth variety comprises gifts of affection given by the husband subsequent to the marriage, and the fifth and sixth presents given by anybody either at the time of the marriage, or at the time when the bride is taken to her new home (170). Vishnu adds three more categories of stridhana, gifts given by the son, gifts from other relations, and the compensation given to the wife at the time of her supersession, on the occassion of her husband's second marriage (171). It mainly consisted of gifts given by relations, either at the time of the marriage or subsequent to it. It was Vijnaneswara who endeavoured to expand the scope of Stridhana. Taking advantage of the word adhyam (etcetera) which Yajñavalkya had used at the end of his enumeration of Manu's six varieties of stridhana, this commentator declared that the expression in question is used

---

(169) A. S. Altekar, The Position of Women in Hindu Civilization, 39;
see U Gaung's Digest, II, 45, 46.
(170) Manu, IX, 194.
(171) Vishnu, XVII, 18.

in order to include the property acquired by inheritance, purchase, partition, chance and adverse possession (172). This amplified definition of stridhana is so comprehensive that it includes every type of property which can be found in the possession of a woman, howsoever it may have been acquired by her (173). It seems probable that the verses of Yajñavalkya cited in the Mitakshara did contemplate those kinds of property which Vijñanesevara sought to include in the concept of stridhana, for he was aware of the extensive proprietary rights of the Dravidian women. Thus regarded, stridhana corresponds to Payin brought to her marriage by a Burmese woman, the Lettetpwa to which she inherits during coverture and her Kanwin. Burmese Law, too, contemplates the making of a provision for the newly married couple by gifts made at the marriage. This is to enable them to make a start in settinggup a household of their own,

"Parents should provide their sons and daughters with a suitable amount of property when giving them in marriage" (174).

It is usual for Burmese parents to announce at the marriage ceremony the presents they have made or intend to make

---

(172) A.S. Altekar, The Position of Women in Hindu Civilization, 221.
(173) ibid, 222.
(174) Wagaru, II, 19.

to the married couple.

It is now necessary to consider the extent of the power which women possessed over their stridhana. Manu, for instance, declares that a wife ought not to alienate even her own property without her husband's sanction (175). This may be compared with the provision under Burmese Buddhist Law. The result of the marriage under Burmese Buddhist Law is that as soon as it takes place, the husband has control over the property brought by the wife and himself. "She holds property with his permission because the husband is the lord and master of the wife. Even in performing works of charity she has to obtain his consent. Therefore a wife should be guided by her husband and she should respect and obey him." (176)

Among the Kallans and the Kunnvans community in South India, divorce is easily obtained on either side. Among Kallans, a husband dis-satisfied with his wife can send her away if he be willing at the same time to give her half of his property (177). Even under Burmese Law, on divorce by mutual consent, Hnapazon property and ordinary Lettetpwa

---

(175) IX, 299.
(176) Digest, II, sec. 251 (Vaṇṇanâ, Râsi).
(177) J. H. Nelson, The Madura Country, a manual, (1868) 34-35, 50-51.

is divisible equally between the parties (178). Among the Kunnuvans, the wife takes with her only such property asshe may have possessed at the time of her marriage. There is a custom amongst the Kamma families of Andhra, that if estrangement results between the wife and husband, her dowry and all other kinds of gifts and presents that were made to the bridegroom or the bride by the bride's people have to be handed back to the bride after rendering a complete account with interest by the bridegroom or his family. It was held that such custom is not against public policy. On the contrary, the custom is really in the interests of women, who are an important section of the public (179).

It may be said that as regards the interests of the spouses in the property of the marriage there were similar rules even in ancient India.

---

(178) O. H. Mootham, Burmese Buddhist Law, 45.
(179) Parandhamayya v. Navaratna Sikhamani, A.I.R. (1949) Mad. 825 (no reference in Text).

7. The property of the Marriage: comparison with Kandyan and Thesawalamai Laws.

The distinction between self-acquired property and ancestral property is found in many systems of law prevalent in South India and Ceylon. In the Marumakkattyam law there is this fundamental distinction. In the Mukkuwa law, too, this division of property is found. It is interesting to note that the words used to connote these conceptions, in the law of Thesawalamai and the Mukkuwa law are identical. In both systems ancestral property is called Mudusam. The Mukkuwas came to Ceylon in the second century A.D. and their laws did not undergo any appreciable change. As the same distinction exists in Marumakkattyam law, which is an offshoot of the Mukkuwa law , it is safe to presume that this fundamental distinction existed under the early laws of the Tamils. The fundamental division of property in Kandyan law is between acquired property and ancestral property. The Kandyans had constant intercourse with the Tamils and hence might have borrowed many legal and political institutions from South India (180).

Under the old law of Thesawalamai property was divided into heriditary property (mudusam) brought to the marriage by the husband, the dowry (chidenam) brought by the wife and acquired property (thediatettam). Originally each spouse was

(180) H.W.Tambiah, "The Laws and Customs of the Tamils of Jaffna, 155.

the owner of his or her separate property. Thus, on the death of the father, all the goods brought in marriage by him were inherited by the son or sons; and when a daughter or daughters married, they received dowry or chidenam from their mother's property; so that the husband's property always remained with the male heirs, and the wife's property with the female heirs, but the acquired property (thediatettam) was divided among the sons and daughters. But in process of time, and in consequence of several changes of Government, several alterations were gradually made in these customs and usages, so that, at present, they are joint owners of mudusam, chidenam and the thediatettam (181). This division closely corresponds to the division of property under Burmese Buddhist Law into payin or atet property which belonged to either husband or wife before marriage and property acquired during marriage (hnapazon and lettetpwa). Under the Thesawalamai law, as under Burmese Buddhist Law, acquired property (thediatettam), in which both have a mutual interest and which is held in common, consisted of the profits arising from the mudusam and chidenam and what is acquired by their exertions, during their marriage. Hereditary property is that acquired by a spouse from his

(181) W.W.Tambiah, The Laws and Customs of the Tamils of Jaffna, 153;
H.F.Mutukisna, The Thesawaleme or the Laws and Customs of Jaffna, Sec.1, 182.

ancestors. Dowry property is that which is given by the parents, brothers or relations at the time of marriage and inheritance. Withers, J., said, "It really comes to this, that according to the Thesawalamai, interpreted by decisions, the separate property of a spouse is that which either party brings to the marriage or acquires during marriage by inheritance or donations made to him or her particularly, while common property is restricted to the rents, revenues, and income of their separate estate and what is acquired by the exertions of spouses." In deciding whether a particular property or a portion of it is thediatettam, one will have to trace the source from which the consideration was derived (182). Under the old Thesawalamai, one should ask himself by question, 'out of what fund was the property acquired.' If out of the moneys acquired during the first marriage, another property is purchased by the surviving spouse it becomes the thediatettam of the first marriage. If it is acquired out of money forming the thediatettam of the second marriage, it will be regarded as the acquired property of the second marriage. There is a striking similarity to the position in Burmese Law. The character of an item of property is not changed by mere change of investment; payin remains payin even though it may have been changed in form, provided it has not been merged entirely in the

(182) H.W.Tambiah, "The Laws and Customs of the Tamils of Jaffna", 170.

jointly acquired property and so changed its character. Change of form does not change the character so long as the payin can be identified (183). Payin brought to a second marriage includes property acquired during the first marriage and also property acquired after the termination of the first marriage and before the second marriage (184).

Under the old law of Thesawalamai, there was a fourth class of property which may be called 'residuary property'. It consisted of property derived by a person after marriage from a stranger, otherwise than for valuable consideration (185). It closely corresponds to thinthi property under Burmese Buddhist Law. All that can be said is that it is the separate property of the husband or wife.

According to Kantawala, in view of the fact that the word 'chidenam' is derived from the Sanskrit word 'stridhana' the law relating to chidenam is borrowed from the Hindu Law. He proceeds, "Yajñavalkya in the 85th verse says, 'Swatantram Na Kurchin Striyah' meaning 'women can have no independence' and thus the law came to be that a wife would hold no separate property; but the evils of the joint family system brought into

(183) S.C.Lahiri, Burmese Buddhist Law, 63.
(184) O.H.Mootham, Burmese Buddhist Law, 9.
(185) W.H.Tambiah, "The Laws and Customs of the Tamils of Jaffna, 153.

greater prominence the hardships connected with this stringent rule, especially when the time came for partitioning the joint property and the law of stridhana gradually evolved, by which the peculiar property of the women could not be parcelled out among the co-owners (186). If the tamils borrowed the word, and converted it into chidenam, it is probable that they borrowed also some of the incidents attached to it.

But, according to Tambiah, the institution of dowry and the peculiar incidence of chidenam must be attributed, not to the influence of Hindu law, but to the matriarchal system of society that prevailed among the Tamils and under the Marumakkathayam law. Chidenam, as known to Thesawalamai, was an institution developed among the first settlers in Jaffna. If a parallel is to be drawn from Marumakkattayam law the chidenam or dowry property originated when a new household branched off from the thavazhi illam known to the Marumakattayam law. It became the practice among the wealthier classes for a husband or the father to provide a separate residence out of his self-acquired property for his wife and children. She was given either a separate house, or a distinct share in the parental house, other landed property, household utensils, jewellery etc., suitable to her station in life. This is the origin of the Jaffna dowry

(186) Thesis on Thesawalamai, 20;
See also, W.W. Tambiah, The Laws and Customs of the Tamils of Ceylon, 36.

system; to use the phraseology of the Malabar law, "the daughter starts the branching off a Tarwad (parents' communal property) into a Tarvazhillam with her husband as its karnavan. It would be a mistaken idea to think that Thesawalamai followed the Hindu law of stridhana in developing the incidents of chidenam or dowry. Hence, he concludes that, as many principles of Hindu law were based on the customary laws that prevailed in South India, it is far more probable that the basic idea of the law of stridhana was developed from the customary laws of the Tamils of South India. It is Dr.Tambiah's view that this theory explains many of the peculiar incidents governing the law of chidenam and accounts for the gulf that exists between the law of chidenam in Thesawalamai and the Hindu law of stridhana (187). If this is so, it is probable that Aryans borrowed the incidents of acquired property and ancestral property from the laws of the Tamils and introduced such modifications as would make them fit into the rules governing a patriarchal society.

Referring to the different kinds of property in Thesawalamai, Ganapathi Iyer says (188) that this division corresponds closely to the division of property in Hindu law into hereditary property, stridhana and self-acquired property.

---

(187) H.W.Tambiah, "Laws and Customs of the Tamils of Ceylon", 37;
H.W.Tambiah, "Laws and Customs of the Tamils of Jaffna, 161, 162.

(188) Hindu Law, 36.

The Burmese like the Tamils probably passed from a matriarchal to a patriarchal system and had constant intercourse with the Tamils, as has been shown earlier. The Burmese, it is generally recognised, borrowed many legal and political institutions from South India. It is probable that the Burmese in defining the nature and incidents of the property rights of married women, made one of the institutions quoted by the Tamils and their concepts of acquired property, ancestral property and dowry.

The essential features which the three systems, the Burmese Buddhist Law, the Kandyan Law, and Thesawalamai have in common are that the estates of the spouses are separate, yet there is a community of acquisitions created by the marriage, and there are rules for the resolution of this community upon a divorce (189). Under the Kandyan Law, as under Burmese Buddhist Law, if the wife is expelled for bad conduct, she has no claim upon the husband or his estate, nor is she even entitled to the wearing apparel supplied by him for her use (190). Thus Manugye says (191),

"For this reason, let him take all the property, and have a right to put her away."

---

(189) H.W.Tambiah, The Laws and Customs of the Tamils of Jaffna, 195;
F.A.Hayley, Kandyan Law, 287;
See O.H.Mootham, Burmese Buddhist Law, Chapter 3.

(190) F.A.Hayley, Sinhalese laws and customs, 196.

(191) Penultimate clause in the passage dealing with the wife's adultery in sec.43 of Bk.XII of Manugye.
In S.A.S.Chettyar firm v. U Maung Gyi, (1936) 14 Ran.329. Ba U J. held that the innocent spouse takes the whole of the joint property of the marriage.

In Thesawalamai, as in Burmese Law, on the father's death, the mother is recognized as the head of the family and she manages the property till she marries again. So long as the parents live, the sons cannot claim anything whatsoever. She has the power of administering such property and to give as dowry any portion of such property to the daughters at her discretion. If she is contemplating a second marriage, partition may be claimed by her children, as in Burmese Buddhist Law. Similarly, if the mother dies first, the father remains in full possession of the estate so long as he does not marry (192). The children can, as in Burmese Law, claim partition of the estate, if he is contemplating a second marriage (193).

In Thesawalamai, as in Burmese Buddhist Law, the result of the marriage is that as soon as it takes place, the husband has control over the property brought by the wife and himself. While the husband has control of his wife's property, the wife has no control over her husband or over the joint property. Thus, the husband, being the manager of the community, has wide powers over the properties belonging to himself and to the community (194). The wife cannot without the consent of the husband alienate her share of the acquired

(192) H.W.Tambiah, Laws and customs of the Tamils of Jaffna, 221.

(193) H.W.Tambiah, Laws and customs of the Tamils of Jaffna, 121.

(194) Ibid., 173.

property. If the wife wishes to deal with her immoveable property (dowry) she must get the concurrence of her husband (xxxx). The Burmese texts forbid the wife to dispose of any property without the previous consent of the husband, (195) if the two spouses had not been previously married.

The Burmese Law has never regarded a woman as unable to incur an obligation. Consequently a debt incurred by her without the knowledge of her husband has always been held valid. But as the husband, according to the texts, (196) was solely entitled to manage or dispose of the property of the marriage, the creditor in case of non payment could not execute a decree for the debt unless the husband had agreed to the undertaking given by his wife. She remained liable to him, but, until the dissolution of the marriage, he was deprived of any remedy. It is difficult to say what remedies were available to creditors under the law in force before the British occupation, because the texts hardly deal with the question of debts except on dissolution of marriage (197). The position was otherwise in the case of spouses who had been previously married; the wife's pre-nuptial property

(195) Digest, II, sec.251, 252.
(196) Manugye, Bk.III, secs.31, 46 and 47.
(197) Digest II, sec.252, 257.

remained at her disposal, and so liable to be taken, as far as it would go, in satisfaction of debts contracted by her (198). The principle was that the wife could not effectively place herself under an obligation, except with the consent of her husband, but it admitted of exceptions, particularly during the prolonged absence of the husband who would be held liable on his return for debts contracted by his wife. Further, he was liable for commercial obligation incurred by her, or debts incurred in a transaction entered into jointly (199). In Thesawalamai, the governing principle is that the separate property of each spouse is liable for the debts of that spouse (200). Under Burmese Law, the whole of the acquired property is liable for the debts of the husband if it has been incurred for the benefit of both parties, with a view of making profit, or on account of their parents or if the wife consents to pay (201). Thesawalamai does not directly deal with this situation, but it seems the whole of the acquired property will be liable,

---

(198) R.Lingat, Lex Regiones Matrimoniux. Ch.II, 41; Digest II, 387.
(199) Digest II, sec.387.
(200) H.W.Tambiah, "The Laws and Customs of the Tamils of Jaffna," 129; H.F.Muttukisna, "The Thesawaleme", 148.
(201) Manugye, Chap.III, sec.30.

for the husband has extensive powers to dispose of the acquired property at will and for the payment of the debts acquired during the marriage (202).

8. Comparison with the customary law of Rembaus, Manangkabau, and the Khasis.

The present condition of the law in Rembau is very complex and can hardly be understood without a brief reference to the history of the state. It appears that some centuries ago bands of Malays from the Archipelago invaded Rembau and established a matriarchal state by intermarriage with the aboriginal women. The next phase was one of peaceful colonisation by eleven tribes who emigrated from the Menangkabau Empire, bringing with them their matriarchal system, which was in a more advanced stage of development. Some centuries later the people were converted to the Muhammadan religion, but retained their pagan law of which they were, and are, extraordinarily tenacious. (203)

Property is primarily classified as of two kinds, acquired and ancestral (204).

(1) Ancestral property (herta peska) - both real and personal viz: that portion of tribal land, acquired by a family in a tribe through the effective occupation of

(202) H.W.Tambiah, "The Laws and Customs of the Tamils of Jaffna, "43.

(203) E.N.Taylor, "The Customary Law of Rembau," I, Journal of the Malayan Branch Royal Asiatic Society, (1929) 7.

(204) Ibid, 8, 15, 29.

generations, and chattels of every kind, once descended from parents to child. This may be compared to inherited lettetpwa or lettetpwa by succession of Burmese Buddhist Law.

(2) Acquired property (herta chanan). This is of two kinds:

(a) The joint earnings of husband and wife during marriage (charian laki-bini). This corresponds to lettetpwa and hnapazon of Burmese Buddhist Law. As in Burmese law, on divorce this joint property is divided equally, and on the death of either spouse, the whole remains to the survivor.

(b) Herta dapatam means the separate estate of a married woman and includes the following kinds of property, viz., her own acquisitions as a spinster, divorcee or widow - charian bujang or janda, - her share of the earnings of any former marriage, and her ancestral property.

Herta pembawa means the personal estate of a married man, the property brought by him to the tribe of his wife into which he passes on marriage; it may include the following kinds of property, viz. his own earnings as a bachelor, charian bujang, his share of the earnings of any former marriage, and any ancestral property of his own family in which he holds an interest.

It corresponds to payin property which belonged to either husband or wife before marriage.

Like-wise in Minangkabau (205) property at the present time is divided into two classes; communal property (harto pusako) and private property (harto pantjariar). The word pusako is borrowed from the Sanskrit and mean, in the original language, "those things which serve to sustain life". The Minangkabau woman nominally owns all the inherited property, but actual title to the property is in the hands of the man; the woman having not the legal right to make a contract.

In India there are two centres of mother-right. One of these represented by the khasis and synteng of Assam. A khasi cannot marry two sisters but he can marry his deceased wife's sister. The groom goes with his bride to her parents but for a few days. (206) The position is the same in Burmese and in Malayan Laws (207). Lt.Col.Gurdan (208) observes,

"the resemblance in the phonetic and morphological structures of Khasi and Malay and even the agreement in their vocabularies are remarkable. Next to language, the most remarkable thing the two peoples have in common is almost identical system of mother's right." Windstedt in his article

(205) Edwin M.Loeb, Sumatra its history and people, Wiener Bertrage zur kulturgeschichte und Linguistic, Vol.III, 119, 120.
(206) W.H.R Rivers, Encyclopaedia of Religion and Ethics. Vol.8. page 59.
(207) Sir R.O.Windstedt, "Mother-right among Khasis and Malays." Malayan Branch Royal Asiatic Society (1932), 9.
(208) Lt.Col.P.R.T.Gurdon, The Khasis, 200-219.

"on mother right among Khasis and Malays" (Negri Sembilan) (209) observes, "Often borrowed customs and beliefs are not irrefragable evidence of any connection between races. But joined with the evidence of anthropology, linguistics and social organisation, the frequent similarity of customs that are apparently primitive perhaps deserves remark."

The Garos who live to the west of the Khasis, and the Megam or Lynngam, who are a fusion of Khasi and Garo, practice a form of mother's right closely resembling that of the Khasis. Though a man cannot inherit property and can possess only that acquired by his own exertions, he nevertheless exercises some control over the property of his wife (210). In this respect, they are nearer to Burmese Law, because in Burmese Law the management of the property is entrusted to the husband (211).

---

(209) Mother-right among Khasis and Malays, Malayan Branch Royal Asiatic Society (1932), 12
Negri Sembilan or the nine states, is a confederacy created after the coming of Raja Melawar. The usual list is Klang, Sungai, Ujong, Naning, Rembau Jelai, Ulu Palang, Telebu, Johal and Segamat.
See R.O.Windstedt - History of Negri Sembilam, M.B.R.A.S., 1930, Part III, 291.

(210) W.H.R.Rivers; "Encyclopaedia of Religion and Ethics", Vol.8, 859.

(211) Digest, II, Sec.251.

The isolation of the Khasi race, in the midst of a great encircling population all of who belong to the Tibeto-Burman stock, and the remarkable features presented by their language and institutions, soon attracted the attention of comparative philogists and ethnologists (212). Mr.J.R.Logan, who, in a series of papers published at Singapore, (213) demonstrated the relationship which exists between the Khasis and certain peoples of Further India, the chief representatives of whom are the Mons or Talaings of Pegu and Tenasserim, the Khmers of Cambodia, and the majority of the inhabitants of Annam. He was even able, through the means of vocabularies furnished to him by the late Bishop Bingandet, to discover the nearest kinsmen of the Khasis in the Palaungs, a tribe inhabiting one of the Shan States to the north east of Mandalay, on the middle Salween. With the progress of research, it became apparent that the Mon-khmer group of Indo China thus constituted, to which the Khasis belong, was in some way connected with the large linguistic family in the Indian Peninsula once called Kolarian, but now more generally known as Munda, who inhabit the hilly region of Chuta Nagpur and parts of the Satpura

(212) Lt.Col.P.R.T.Gurdon, The Khasis, (1914), Introduction. xviii.
(213) The Journal of the Indian Archipelago, (1850)& (1853).

range in the Central Provinces of these tribes the principal are the Southals, the Mundas and the Korkus. The points of resemblance in their language and in some of their institutions cannot be denied; and the exact nature of the relation between them is as yet one of the unsolved problems of ethnology (214).

R.C.Majumdar, the well-known Indian scholar and archaeologist, has recently summed up the evidence of Schmidt and other scholars in favour of the Malay race having originally come from India, where the Mālaya-Mallava tribe was widely spread, and of their original emigration to Sumatra and the Archipelago having taken place in what he called 'pre-historic times'. He says that, if this were accepted, the cumulative effect of these colonizations in the Far East to a time prior to the Aryan or Dravidian conquest of India, and that it would not be rash to imagine that this colonization was, partly at least, the result of Dravidian and Aryan settlements in India dislodging the primitive inhabitants and forcing them to find a new home across the sea (215).

This assumption is based chiefly on the evidence of linguistic affinities existing between certain primitive tribes of India such as the Munda and Khasi with Mon-Khmer and allied

(214) Lt.Col.P.R.T.Gurdon, The Khasis, (1914), Introduction, xviii.
(215) Reginald Le May, "The Culture of South East Asia, 27.

languages, grouped together in the family called Austro-Asiatic and their further connexion with the Austro-Nesian family to which the Malays belong. Schmidt regards the peoples of Indo-China and Indonesia as belonging to the same stock as the Munda and allied tribes of Central India, and the Khasi of Assam in North-Eastern India (216).

Loeb, however, observes, "The presumption therefore lies in favour of historical diffusion of custom. There is strong linguistic indication that perhaps somewhere between the first and second millenium B.C., Sumatra was subjected to direct Dravidian influence, and that certain sociological customs, including avoidance customs and joking relationships, cross cousin marriage, matrilineal and patrilineal sibs, and exogamy were imported from Southern India into Sumatra and the Pacific." (217)

Frem, the Dutch archaeologist, however, basing himself on Hornell's theory, believed that it was Indonesians who colonized India in pre-historic times, and that the later Aryan colonization of the Far East was merely the reverse of that process. Moreover, Schmidt's linguistic theories have been seriously challenged, notably by G. de Hevesy, who denies the existence of the Austro-Asiatic family of languages

---

(216) Reginald Le May, "The Culture of South East Asia", 27.

(217) Edwin M.Loeb, "Summatra its History and People", Wiener Bertrage zur Kulturgeschichte und Linguistic, Volume III, 120.

altogether. May, observes, "If the Malays originally came from India, it is not surprising that they readily accepted the Indian religious influences when these flowed back in later times." (218).

It will thus be seen that this subject is still highly speculative and controversial, and it is for the anthropologist and sociologist to complete the work. Beyond mentioning it, I do not propose in this chapter to discuss it further.

Rivers observes, "It is not at present possible to connect mother-right with race. It occurs side by side with father-right and with intermediate forms among many peoples, including the Australian, Melanesian, Indonesian, W. African, Negro, and N.American Indian. Most of the peoples who practice it rank low in the scale, but there are definite exceptions to this generalization in the Khasis of Assam, the people of the west coast of India, the Minangkabau Malays of Sumatra, and many tribes of N.America.

In several parts of the world we have definite evidence that a condition of mother-right has changed either into one of father right or into a form of social organization in which social rights are recognized with the relatives of both father and mother.

---

(218) Reginald Le May, "The Culture of South East Asia", (1954), 27.

In other parts of the world there is a definite evidence that the change has been from the matrilineal to the patrilineal mode. There is a large body of evidence pointing to the change having been in this direction in Melanesia." (219)

De Moubray observes, "The matriarchal communism can undergo metamorphosis. The other main line of evolution or degeneration is the break up of the matrilineal factor itself.

Three other forms of descent are possible:

(i) the patriarchal (or paternal) in which descent is reckoned solely through the father;

(ii) the parental in which descent is reckoned through both parents; and

(iii) a peculiar sporadic form hybridized of matriarchy and patriarchy in which some of the children follow the mother, some the father." (220)

He then says, (221), "There are unique elements in the particular resultant of the decay of matriarchy exemplified in the Malay Peninsula. Among the most striking is the 'parental joint family'. On the break up of matriarchal joint families I suggest that an entirely new type of joint family came into existence; that comprising a 'parental' family unit of husband,

(219) W.H.R.Rivers, "Encyclopaedia of Religion and Ethics," Vol.8, 859.

(220) G.A. De C. De Moubray, "Matriarchy in the Malay Peninsula", (1931), 99.

(221) Ibid at 114-115.

wife and children. At marriage husband and wife pooled the whole of their property and enjoyed it jointly. The property that each brought to the marriage would it is true be separated out at death or divorce, but even this would be enjoyed jointly during the continuation of marriage."

It may be said that as regards the property interests of the spouses, there are similar rules throughout S.E.Asia, including ancient India. As to the origin of that law, if, as the historians suggest, the peoples of S.E. Asia before the invasion of the Thais, and the Burmans were an Austro-Asian, matriarchal people, whether the law of S.E. Asia is some sort of compromise or amalgam between the law of the invaders and the matriarchal law of the indigenous peoples, is a question to which, on the evidence at present available, it is difficult to suggest an answer. In Sumatra, a study of two neighbouring but opposite systems of government and property ownership (patrilineate and the matrilineate) has led Loeb to conclude that the presumption lies in favour of historical diffusion of custom (222). It may be said that in Burma, an amalgam may be stronger than its component units, but prima facie at least, a compromise between patriarchal and matriarchal marriage laws would seem unlikely to produce anything so robust as the property

(222) Edwin M.Loeb, "Sumatra its History and People", Wiener Bertrage zur Kulturgeschichte und Linguistic, Vol.III, p.119.

of the law of marriage of S.E. Asia, which has so many centuries survived Chinese incursions and modern Hindu influence.

9. Succession - Testamentary and Intestate: Comparison with Ancient Indian Law, Kandyan Law and Thesawalamai.

Some Dhammathats contain texts which might at first sight seem to support the view that at some time in the past, it is possible that testamentary powers were exercised, and that the law permitted property to be disposed of on the death of the owner according to the directions given before his death.

Pyumin: "..... what the dead gives, the living get...

Râsi: "a gift of property made by one to take effect on his or her death is valid, and the donee shall get the property....

Râjabala: "a gift made to take effect on the death of the donor is valid....

Kyannet: "Property left to a person by another on his or her death becomes the separate property of the donee and is not subject to partition. (223)

It may be that some form of testamentary dispositions was known to the authors of some of the Dhammathats; their learning in Buddhist ecclesiastical lore made them acquainted with acchayadanam; and, on the authority of Buddhaghosa, they declared such donations to effect on death, permissible to

(223) Digest I, 78.

laymen though prohibited to rahans. But the innovation they attempted to introduce, never did become part of the secular laws of the Burmese people (224).

The exercise of testamentary powers is not mentioned in any of the decided cases of the Burmese Courts, and no instance has come to light where claims were made to property based on the disposition contained in a will.

The Anglo-Burmese Courts have consistently maintained that there is no notion of a will in the Dhammathats or Buddhist scriptures, and that the right to share in the ancestral estate is not affected by any instruction or will on the part of a co-heir (225).

In India testamentary dispositions as such seem to have been unknown until the 1760's, even in South India (226). They were regarded at first with distaste or abhorrence, and the law, when it did emerge into the light of day, was a development, in part, from the pre-existing law relative to the father's well-known powers of disposing of family property inter vivos (227), particularly upon his retirement from worldly concerns (228), and in part from the law relating to

(224) U E Maung, Burmese Buddhist Law, 114.
(225) Mg. Me v. Sit Kin Ngo, (1887) S.J.429.
(226) Mayne, Hindu Law and Usage, 873;
P.V.Kane, History of Dharmasastras, iii, 816-8.
(227) P.V.Kane, History of Dharmasastras, iii, 567;
Mayne, Hindu Law and Usage, 547-8.
(228) P.V.Kane, History of Dharmasastra, ii, 917-48.

gifts inter vivos. (229)

The law of testamentary succession was unknown in Kandyan law. What is clear, however, is that in 1815 testation was commonly believed to have been a more or less recent development in Kandyan law. Dr.Derrett, (230) is disinclined to believe that Portugese or Dutch influence had anything to do with it, and suggests that, given the principle that the owner can dispose of his property in general freely inter vivos, and given that the community was willing to approve its exercise for the valid disinhersion of unworthy or disqualified natural heirs, a custom of making donationes mortis causa and death-bed partitions of property amongst conflicting issue by several marriages, wives, former wives and concubines would develop into such a pitch of organisation that, when written documents came into more general use, the acceptance of the concept of a testamentary instrument merely put the finishing touches on a steady development which was ready to receive it. The developments amongst the Sinhalese must be attributed to local evolution under the influence of local conditions. In Burmese law,

(229) J.D.M.Derrett, The Origins of the Laws of the Kandyans, University of Ceylon Review (1956), 125.
(230) Ibid, 125.

there was a kind of disposition by thedansa, but a thedansa is not the same as a will. Parents when conscious of their approaching death would call their heirs together and make a formal division orally or in writing, of their property amongst the heirs and exhort them to accept the allocation without dispute. If this disposition was reduced to writing, the document was called a thedansa, (231), but the efficacy of the disposition depended, not on the document, but on its acceptance by the heirs. Although, originally, there was much similarity between Burmese and Kandyan laws in the rules governing disposition of property by the owner before his death, the power of testamentary alienation did not develop in Burmese law as it did in Kandyan law.

Though such disqualifications are known in ancient systems of law, in Kandyan Law, as in Burmese Law, an heir will not lose his inheritance because he suffers from physical or mental defect (232). In Kandyan law, there existed a custom, by which the donor, in the presence of the assembled villagers, declared his determination to disinherit a son (233). In Burmese law, according to the Dhammathats, a child who is

(231) S.C.Lahiri, Burmese Buddhist Law, 144.
(232) F.A.Hayley, Kandyan Law, 327;
O.H.Mootham, Burmese Buddhist Law, 82.
(233) F.A.Hayley, Kandyan Law, 327.

incorrigibly disobedient, or who behaves like an enemy towards his parents, is debarred from inheriting his or her parents property. Such a child is called a 'dog son' or 'son like a dog: swanutta. Persistent and continued unfilial conduct may debar a child from inheriting from his parents, but a single act of mere disobedience, however gross, as in Kandyan law, (234), would not be a disqualification, unless such act was an act of positive enmity (235).

Various kinds of sons.

Manu mentions various kinds of sons, viz. the aurasa (legitimate son), the kshetraja (son begotten on the wife), the dhattaka (son adopted in religious form), the krittima (son adopted in secular form), the gudhaja (son secretly born), the apavidha (son cast off), as the sons with rights of inheritance, and the kanina (maiden's son), the sahodhaja (son of pregnant bride), the krihka (son bought), the paunarbhava (son of remarried woman), the suyamdatta (self given son), and the nishada or parasava (son of sudra wife) as the six without rights of inheritance. (236)

Wagaru mentions the orasa, hettima, khettaja, pubbaka, kittima, and apatittha as entitled to inherit but without

(234) F.A.Hayley, Kandyan Law, 327.
(235) O.H.Mootham, Burmese Buddhist Law, 121; S.C.Lahiri, Burmese Buddhist Law, 205-6.
(236) Manu IX, 166-175.

defining these terms. The dinnasko (son given by others), the sahoda (son bought), the ananupaya (son begotten in amorous play), the avanutta (dog son i.e. rebellious son), the chattabhattaparabhatassa (abandoned child taken into the household and maintained) are the sons not entitled to inherit (237).

The terms used in Wagaru are found in many other dhammathats, though, in the later dhammathats, the hettima and khettaja change places. Kaingza defines the orasa as the son of a marriage contracted by parental authority, the khettaja as the son of a female slave, the hettima, as the son of a concubine, the pubbaka as the son of a former marriage, the kittima as the son publicly adopted, and the apatittha as the son casually adopted (238).

The connection between auratha and orasa, between kshetraja and khettaja, between krittima and kittima, between apavidha and apatittha, as well as the fact that both the Dharmashastras and the Dhammathats have six categories of sons given the rights of inheritance and six not so entitled suggests the Indian influence and that the Burmese jurists had acquaintance with the Dharmasastras.

---

(237) VI, 83-84.
(238) Kaingza-Shwemyin, 59.

Shares of sons by different wives.

The rule of division in Burmese Law among the sons of different wives, i.e. the lawful wife, concubine, and slave wife, may owe something to Hindu Law. If this be so, the adaptation has been such as to render the rule of Hindu law hardly recognisable. It may well be that this rule follows as a matter of course from the provision that on marriage, each spouse takes an interest in the property brought to the marriage by the other and the property inherited during marriage by the other. "If a man has a chief wife, a concubine, and a slave wife, and has a son with each on his death the son of the chief wife inherits four portions, the son of the concubine one portion, and the son of the slave wife $\frac{1}{2}$ portion." (239) Manu deals with the case of a Brahmin who leaves sons by wives belonging to each of the four castes. First he says that the Brahmanas son gets three portions, the Kshatriyas son two, the ~~vaisejas~~ vaisyas son one and half, and the sudras one (240). But later, he gives a different rule. "The Brahman (son) shall take four shares, the son of the kshatriya (wife) three, the son of the vaisya shall have two parts, the son of the sudra may take one share. (241)" He goes on to say that the son

(239) Dhammavilâsa, XIV, 45.
(240) Manu, IX, 151.
(241) Manu, IX, 153.

of the sudra wife (later interpreted as slave) gets only 1/10th which is not inconsistent with the last rule, and finally provides that the son of the sudra wife only gets what his father chooses to give him. (242)

Shares by different wives.

The shares prescribed by the Dhammathats for the wives are the same as those laid down for the sons in Manu except that the Kshatriya and Brahmin change places. "The Lord Rishi Manu has decided that the property of a man should be thus divided among the four kinds of wives. If the wife belongs to the royal family she shall receive 4 shares; if she belongs to the Brahmin family she receives 3 shares; if she belongs to a merchant family she receives 2 shares; if she belongs to a cultivator's family she receives one share (243). In contrast Manu contains no rules for partition between the wives. Manu does not, in fact, deal with the widows right of inheritance. The texts in which the right is recognised in Hindu law are in Brihaspati and Kartyayana, though in the text 'after the death of the Father and the Mother, the brothers being assembled, may divide among

---

(242) Manu, IX, 155.
(243) Wagaru, VI, 81.

themselves in equal shares (the patriarchal) estate, for they have no power while the parents live." (244) Manu seems to recognise, in an early stage in the development of the Hindu law, a widow's estate intervening between the death of the father and partition by the sons after her death.

General Order of Succession.

The Burmese Law of Succession displays some features which can be linked with ancient Indian customary law, as will be seen below.

---

(244) Manu, IX, 104.

General order of Succession under ancient Indian Law. (245)	General order of Succession under Thesawalamai (248)	General order of Succession under Burmese Buddhist Law (249)
The Pre-Aryan inhabitants of the Indian Peninsula allowed property to devolve upon his heirs in the following order: First - The surviving spouse (246) Secondly - Descendants. Thirdly - The parents. Fourthly - The first line of collaterals, namely brothers and sisters. (The elder brother is distinguished from younger brother in succession. It seems younger brother is preferred to elder brother (247). Fifthly - The grandparents. Sixthly - The second line of collaterals, namely uncles and aunts.	The estate of a deceased person, will in general terms, devolve upon his heirs in the following order: First - The surviving spouse. Secondly - His descendants. Thirdly - The first line of collaterals, namely brothers and sisters. Fourthly - The parents. Fifthly - the second line of collaterals, namely uncles and aunts.	The estate of a deceased person will, in general terms, devolve upon his heirs in the following order: First - The surviving spouse (subject to the share of the orasa, if any). Secondly - His descendants. Thirdly - the first line of collaterals, namely brothers and sisters. As between the brothers and sisters of the deceased, those younger than the deceased exclude the elder (250). Fourthly - the parents. Fifthly - The second line of collaterals, namely uncles and aunts.

(245) J.M.D.Derrett, The Origins of the Laws of the Kandyans - University of Ceylon Review (1956) 105 at 130.

(246) See Note (165) supra; Dayabhaga, sec.XI; A.S.Altekar, The position of women in Hindu Civilization, 256.

(247) Epigraphia Canatica Volume III (Mysore) (1157 A.D.). Tirumakudu - Narasipur Taluq 21, 71;

The elder brother's property will go to the younger brother, and the younger brother's property to the elder brother. See also - University of Ceylon Review (1956) at 130; "the property of those who die without children shall go to elder brother, younger brother.....; See also Mysore A.R.1920, para.77, dated 1297, "The property of the elder brother should go to the younger brother...."

(248) H.W.Tambiah, The Laws and Customs of the Tamils of Jaffna, 238-9.

(249) O.H.Mootham, Burmese Buddhist Law, 75.

(250) O.H.Mootham, Burmese Buddhist Law, 73.

It may be said that a strong similarity exists between the ancient Indian Laws. There are similar rules in Kandyan and Thesawalamai Laws. It may be said that as regards inheritance, it is substantially the common law, not only of Burma but of S.E. Asia. The Burmese law of inheritance could not have originated from Hindu Law, because the two systems are based on fundamentally different conceptions as to what the social unit is, the status of the unit and the nature of the rights and obligations between the members of the unit. Burmese society is not based on the joint family which forms the foundation of the Hindu society. The Hindu law of succession seems to have developed from the assumption that only agnates possessed property rights. The Hindu Law of inheritance accommodated itself to the rules governing the joint family. In some instances, the Burmese writers borrowed whole texts verbatim from the Dharmasastras, and it was this which enabled Forchhammer to conclude that there was scarcely a text in Wagaru without its counterpart in the Dharmasastras. In substance, the Burmese and Hindu Law of inheritance are different. The Burmese jurists borrowed those texts that were applicable to Burmese Buddhist Law. It may be admitted that in relation to the rules of inheritance the debt of the Burmese jurists to the Dharmasastras lies in the method of exposition rather than in substance.

CHAPTER III

THE SOURCES OF BURMESE BUDDHIST LAW.

1. Meaning of the term 'source of law'.

The term 'source of Law' has different meanings in Jurisprudence. According to Austin, the term 'source of Law' means the immediate author, namely, the Sovereign from whom all law emanates. (1) In another accepted sense he says that the term 'source of Law' means the original or early extant documents by which the existence of law is known. In this sense the work of the Glossators may be said to be a source of Roman Law. According to Holland, the term 'source of law' may have the following meanings: (a) the quarter whence we obtain our knowledge of Law, e.g. statute books, Law Reports, treatises, etc.; (b) the ultimate authority which gives them the force of law, namely, the State; (c) the causes which have brought into existence rules which have subsequently acquired the force of law. He mentions three such sources of law:- Custom, Religion and scientific discussion; (d) The organs through which the State grants legal recognition to rules previously unauthoritative or the organs which create new law such as adjudication, equity and legislation in England. (2) The term 'source of Law', has therefore many uses

---

(1) Austin's Jurisprudence, 284.
(2) T.E.Holland, "The elements of Jurisprudence, 55.

and its use is a frequent cause of error unless we scrutinise carefully the particular meaning given to it (3). In this connection, a relevant passage from the Royal edicts of 1146 B.E.(1784 A.D.) may be quoted as follows:-

ဖောင် သူ့ ဖောင် သား၊ တ ဂု၊ ပွန် စ ကို၊ ပြုန် ခ သိ၊ အ ကို၊ အ ဂု၊ ကို၊ ဟ ကို၊ ဟု၊ အ ဂု ဟ ဟု ဟ စီ ဂင် ခဲ ဟု၊ ခ ဖ ခ ဖ ကာ် ရှိ ပု၊ ၊ ဂ ဒူ သ တ၊ ဂု ဂ သ တ၊ ပြ တ် ထုံ၊ ၊ ပြန် ခ ဒူ၊ ၊ စီ ဂင် ထုံ၊ ၊ အ ဖောင် ။။ အ ဖောင် လ ရှိ သ ဒူ ကို ဖ ထာ က် ပြီ၊ ပြီ သို့ ခဲ့ ရှိ ခ ဒူ၊ သို့ အ စီ ဂင် ခဲ ရှိ ခ ဒူ၊ ခင် ပြင်၊ ခ က် လ က် ရွှေ့ ဖ လာ၊ ရှိ ခ ဒူ၊ ဖ ဖောင် ကို့ စ က်၊ အ ကို၊ အ ဂု ပြန် သ ဒူ၊ အ ခီ ဂင် ခဲ ရှိ ခ ဒူ ခ ကို ပြင်။

"If the unlettered peasant, through ignorance of law, should in relation to hereditary office or appendage or theft or rapine or in respect of other legal customs, raise inappropriate pleas, instruct him what to plead, how to present his petition and to support them by appropriate argument, having due regard to the Manu, Dhammathat, the Mano Dhammathat, the Shwe Myin Dhammathat, Royal edicts, ancient precedents and Judicial decision." (4)

It would appear that the Burmese Courts, under Burmese Kings recognized customs, ancient precedents, judicial decisions, and Dhammathats as sources of Burmese Law.

2. Custom as Source of Law.

According to section 13 of the Burma Laws Act 1898,

(3) G.N.Paton, Text Book of Jurisprudence (1946), 5.
(4) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R.147 (S.C.) at 117.

Buddhist Law is applicable to suits involving any question relating to succession, inheritance, marriage, or caste, or any religious usage, or institution, and that it may be overridden or varied by any statute or by any custom. Adamson C.J. in Thein Pe v. U Pet (5) expressed himself as "In determining questions that come within the purview of section 13 of the Burma Laws Act, 1898, it should never be forgotten that the texts of the Dhammathats are not the sole guide. Those form the rule of decision only in so far as they are not opposed to any custom sharing the force of law."

Page C.J. observed, "Now the customary law of Burmese Buddhists is the common law of Burma, and a fundamental and wholesome characteristic of the common law is that it is not rigid and unelastic like a code but can be moulded to conform to the customs and needs of the people as they change from age to age." (6).

In re Maung Thein Maung v. Ma Kywe (7), Page C.J., remarked that:

'Much of the ancient customary law of the Burmese people to be found in the Dhammathats has become anachronistic, and cannot intelligently be applied to the Burmans of the present day; for the facts and conditions upon which many of the rules

(5) (1906) 3 L.B.R.175.
(6) N.A.V.R.Chettyar Firm v. Maung Than Daing, (1931) 9 Ran.524 at 537 (F.B.).
(7) (1935) 13 Ran.412 (F.B.)

laid down in the Dhammathats rest find no counterpart in the conditions and customs that exist in modern Burma, and under which the people now live and move and have their being."

Present customs, the learned Chief Justice pointed out in the same case, were a safer guide than the little known laws of the Dhammathats, and he suggested that the time had come in which Burmese Buddhist Law was under consideration, that recourse should be had to the testimony of those conversant with the customs and habits of the people for the purpose of elucidating how far modern practice is in consonance with ancient precepts. (8)

According to the modern view (9) "custom can only become law if it is recognized as such by the sovereign. This recognition may be bestowed by the legislature (as when an Act of Parliament adopts a custom), or by the Courts (as when a custom is embodied in a judicial decision).

Assuming that the assent of the Sovereign is necessary to convert custom into law, it may be asked when custom acquires legal sanction. Austin considered that a custom becomes legally binding from the date at which the Act of legislature, or the judicial decision incorporating it, comes into operation, while others thought that it becomes so as soon as it satisfies certain conditions required by law as essential to its validity, even before it is expressly sanctioned by an Act

(8) (1935) 13 Ran.412 (F.B.).
(9) Wise's Outlines of Jurisprudence 113.

of Parliament, or has received recognition by Judicial decision. Salmond, therefore, said that custom is law not because it has been recognized by the Courts, but because it will be so recognized, in accordance with the fixed rules of law, if the occasion arises."

Blackstone said that custom to obtain legal validity in English law, must comply with the seven requisites: It must be (i) immemorial - i.e. it must have been followed so long that "the memory of man runneth not to the contrary, (ii) continuous, i.e. the observance must not have been interrupted; (iii) peaceable and acquiesced in - i.e. not subject to contention or dispute; (iv) reasonable or at least not unreasonable; (v) certain - i.e. not vague and indefinite; (vi) compulsory - i.e. it must not be optional to follow it or not, and (vii) consistent with other customs. To that he added that if the custom derogates from the Common Law, it must be strictly construed and that it must not be contrary to the provisions of an Act of Parliament or an infringement of the prerogative of the King. If a custom complies with the said conditions, it becomes legally binding, whether or not it has been approved by the Legislature or the Courts.

According to Perry (10) the universal tests may be summarized as follows:-

---

(10) Perry's Oriental Cases, 120.

(1) The alleged custom must be reasonable;

(2) It must have been long established, i.e. not necessarily ancient, but continuous and notorious.

(3) it must be certain or definite; otherwise, it becomes incapable of being administered through a Court of Law;

(4) it must have been uniformly and universally observed by the community to which it is attributed, as binding law and not merely of choice; and

(5) it must not be incompatible either directly or by necessary implication, with any enactment of the legislature binding on that community in a similar matter (11).

Of the above requisites, the element of reasonableness is very important and is always very carefully scrutinized by the Courts. An alleged custom so entirely in favour of one party as to be fundamentally unjust to the other, cannot be considered as reasonable (12). Similarly, a custom which is repugnant to natural justice, equity and good conscience should not be enforced on ground of unreasonableness. Nor can a custom which is opposed to morality and public policy be supported at law (13).

A custom that derogates from the general law applicable to

---

(11) See Mayne on Hindu Law and Usage, 163.
(12) Ma Yin Mya v. Tan Yauk Pu, (1927) 5 Ran.406 (F.B.).
(13) Keshaw v. Bai Gandhi, (1915) 39 Bom.491.

a person must be proved by clear and unambiguous evidence, by him who asserts it (14). If a person prima-facie governed by a custom, claims exemption from it, the burden of proving the exemption lies on him (15). Where the existence of any custom is in dispute, the onus is on the person relying upon it.

In the case of Collector of Madura v. Mootoo ~~Ramliga~~ Ramalinga (16) their Lordships of the Privy Council observed that clear proof of usage will always outweigh the written text of law.

Thus, to illustrate how custom that has the force of law, supersedes a provision of Burmese Buddhist Law we may take the case of an adoptee who though required by the Dhammathats to live with the adopter to entitle him to inherit from the latter is now considered competent to inherit though he lives apart. The reason is that there is now a change in custom (17).

3. Judicial decisions and treatises.

The decisions of the Hloot or the Burmese Courts some of which have been compiled and published as "Hlut-taw Records", afford but an insignificant guide for the interpretation of the principles of Burmese Buddhist Law. They are not good enough to serve as authorities or precedents which modern courts could adopt safely.

(14) Subarao v. Radha, (1928) 52 Bom. 497.
(15) Ma Tin v. Doop Raj, Barua, (1892-96) II U.B.R. 608.
(16) (1868) 12 Moore's I.A.397.
(17) Nga Min Gyaw v. Me Pi, (1873) S.J.8.

The authorized reports of the judicial decisions of the Courts in Burma since the annexation constitute another important source of modern customary law. They include the decisions of the Judicial Committee of the Privy Council, and now the Supreme Court of Burma as well as the High Court of Judicature at Rangoon. It is also certain that some of the decisions of the Recorder's Court of Rangoon, the Courts of the Judicial Commissioners of both Upper and Lower Burma and also the special court, form a valuable guide to the correct decision of disputes under customary law by the Courts. The Courts in deciding particular cases, enunciate the principles of law involved, and these views of law in so far as they have not become obsolete by recent changes of customs on which they are based, are acted upon in similar cases arising subsequently on the principles of stare decisis (abide by decided cases) and communis error facit jus (common error makes a right). The binding force of precedents is fully acknowledged.

One of the outstanding effects of judicial decisions on Burmese Buddhist Law by English Judges before Independence of Burma was the importation of English ideas of equity into the system. This is one of the channels through which English law has made its influence felt in Burmese Law. For example, the rule that a 'kittima' adopted child does not need to

reside with the adoptive parents is, as observed by U May Oung, almost entirely the result of Judicial legislation (18), though the Dhammathats insist on joint residence of such child and the adoptive parents (19). Likewise, the Anglo-Burmese Courts have from very early days, recognized the right of either spouse to sue for restitution of conjugal rights where the other has failed in his or her marital duty, although such a suit is not expressly recognized by the Dhammathats (20). Thus, judicial decisions sometimes pave the way for the growth of new customs, and often settle existing customs by giving them recognition. In this sense, they may be treated as another important source of Burmese Customary Law.

Legal treatises, as distinct from modern text-books, may be a distant source of present day customary law, though they were not originally written with official sanction. Some of the Dhammathats digested by the Kinwun Mingyi came under this head (21). Such books are no doubt useful for guidance of the Courts at a time when customary law is still uncodified and it chiefly exists in the form of customs. A treatise by a modern scholar merely records the opinion of the author; it does not make law, though it may afford valuable materials for argument.

(18) U May Oung, Leading Cases on Buddhist Law, 158
(19) Digest I, Sec.195.
(20) Nge Nwe v. Mi Su Ma, (1886) S.J.391.
(21) (30) Manugye appears not to have been compiled by Royal Command.

4. Pitakas and Commentaries.

The Pitakas and Commentaries thereon are another source of Burmese Buddhist Law. There are three Pitakas, namely (i) Suttam Pitaka, (ii) Vinaya Pitaka, and (iii) Abhidhamma Pitaka. They are the compilations of the teachings of the Buddha. The Suttam Pitaka contains ancient Buddhist customs prevailing in Buddhist India. The Vinaya Pitaka consists of five texts, namely (i) Parajikam, (ii) Pacittiya, (iii) Mahavagga, (iv) Chulavagga and (v) Parivara. There are three principal commentaries on those Vinaya texts and they are known as Atthakathas, Tikas and Gandhandharas. (22)

As the Buddhist monks profess to be governed by the Vinaya Pitaka, and its commentaries, the law applicable to ascertain the rights and obligations as between monks themselves or between monks on the one side and laymen on the other is that to be found in the rules of the Vinaya and not in the Dhammathats (23).

---

(22) S.C.Lahiri, Burmese Buddhist Law, 271.
(23) Shwe Ton v. Tun Lin, (1918) 9 L.B.R.220 at 223.

CHAPTER IV

THE DHAMMATHATS.

1. The Dhammathats as a source of Law.

Furnivall said, (1),

"When the Pilgrim Fathers left the shores of Europe to found a new world in the West, they took with them their supreme code of law, the Bible. In like manner, a thousand or more years earlier, the emigrants from India, Hindu and Buddhist, who laid the foundations of a new world in the Tropical Far East, took with them their new law book, the Code of Manu. Everywhere throughout this region Manu has left his mark; in Burma both among Mon and Burman, in Siam, Cambodia, Java and Bali. To follow him through his various incarnations, Hindu and Buddhist, in these various countries would be a fascinating problem and should throw much light upon the cause of Indian influence in Further Asia." The word Dhammathat is a corruption of the Sanskrit word 'Dharmashastra' (2) meaning a law book. By law, we mean not the sacred law preached by the Buddha, but the customary law of the Burmese. According to the Kinwun Mingyi, the compiler of the Digest of Burmese Buddhist Law, a Dhammathat is "a collection of rules which are in accordance with custom and usage, and which are referred to in the

(1) J.S.Furnivall, Manu in Burma. (Some Burmese Dhammathats,) The Journal of the Burma Research Society (1930-31), Vol.XXX, 351.

(2) S.C.Lahiri, Burmese Buddhist Law, 21.

settlement of disputes relating to person and property (3)."

In Kirkwood (a) Ma Thein v. Maung Sin (4) their Lordships of the Privy Council said that 'Burmese Buddhist Law is contained in a series of books entitled 'Dhammathats' which have been composed from time to time by the expounders of that law ever since the thirteenth century if not before." This remark does not, however, justify the view that customs and usages contained in those Dhammathats are still current. Burmese Customary Law is not a codified law and the Dhammathats contained not only the ancient customary law of the people but also that which was prevalent at the time of their compilation, which at times conflicts with the former. It has been said that changes in customary law are wrought by evolution of time and many of the customs embodied in the Dhammathats have apparently become obsolete with the progress of civilization of the people. Accordingly, Major Sparks was perfectly right in saying about Manugye - that it is in a great measure obsolete, and is no more applicable to the decision of suits of the present day in the Courts of Pegu than are the laws of Alfred in the modern Courts of England (5). It may be pointed out that Manugye, in the view of Forchhammer, is a comparatively modern compilation, as it is supposed to have been written in 1756 A.D.(6).

Irwin, J., in Thein Pe v. U Pet said, (7),

---

(3) Digest 1, sec.2.
(4) (1924) 2 Ran.693 at 773 (P.C.).
(5) Sparks Code, Sec.2.
(6) Jardine Prize Essay, 108. (7) (1906) 3 L.B.R.175 at 187.

"The law to which they (Burmese Buddhists) are subject was not, in my opinion, the law of the Dhammathats, but the customary law, for the ascertainment of which the Dhammathats are a very important guide, but not the only guide."

Thus in Ma Hnin Zan v. Ma Myaing (8) it was observed

"The Court is not only at liberty, but is bound to decide the case in accordance with the Burmese customary law as it obtains today, rather than to perpetuate the outworn shibboleths of bygone ages, notwithstanding that some sanction for their continuance may be found in extracts from the Manugye Dhammathats. It may now be taken as settled that the duty of the Court is not merely to administer law as contained in the Dhammathats, but to find out what the existing law is and to enforce the same, in keeping with the "fundamental principle of British imperial policy that so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognized and respected (9)."

The above view is in accordance with the following dictum of Page C.J., in Maung Thein Maung v. Ma Kywe(10),

"The truth is that Burmese Customary Law of inheritance as set forth in the Dhammathats is not, strictly speaking, a

(8) (1935) 13 Ran.482 at 496.
(9) Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932)10 Ran.97 at 103.
(10) (1935) 13 Ran.412 at 420. (F.B.J.)

system of law at all, but a congeries of decisions which are merely pronouncements ad hoc upon particular cases as they have arisen, and which for the most part do not purport to be determined pursuant to any general or guiding principle. Of course, the Dhammathats are not the sole repository of Burmese Customary Law, and I agree with U May Oung that the present customs are a safer guide than the little known law of the Dhammathats."

Again, a similar view was taken by Dunkley, J., in Maung Thein v. Maung Nyo Sein (11) where he observes,

"The task of the Courts of British Burma has been and still is, to deduce from the ad hoc decisions compiled in the Dhammathats, general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of today."

2. Origin of the Dhammathats.

It is generally recognised that Hindu Law as presented in the Dharmasastras has exercised a deep influence on the development of indigenous law in Burma, Siam, Cambodia and Laos, still visible in their present legal systems. In all these countries, the name of Manu is associated, as in India, with the origin of the law (12).

---

(11) (1939) Ran.160.
(12) R. Lingat, "The Buddhist Manu", Annals of Bhandarka Oriental Research Institute Vol.30, (1949) 284.

In Min Lan v. Maung Shwe Daing (13) the learned Judicial Commissioner remarked,

"The Hindu Law has been borrowed though we do not know exactly when and from what source, and has been modified by the requirements of a non-Indian race which had adopted the religion of Buddha. In applying Hindu Law, essential differences of conditions, racial and religious, must have been found in two important particulars, the position of the wife and the constitution of the joint property."

It is not proposed to deal with the origin of the Dhammathats at great length, as it should form the subject of a separate thesis, but it is desirable to consider how far the above statement is true.

After some personal study, Sir John Jardine persuaded Dr.Forchhammer to enquire into the origin and history of Burmese Law. The result of his research was published in Burma in 1855 under the title 'The Jardine Prize Essay'. It is the only general work we still possess on the subject. J.S.Furnivall (14) has cast some doubt on Forchhammer's conclusions and on the value of texts upon which it is founded, without, however, questioning his thesis concerning the general evolution of Burmese law.

The first reference we find to a Dhammasattham is in a

(13) Chan Toon's, Leading Cases, 308.
(14) J.S.Furnivall, Manu in Burma: Some Burmese Dhammathats. The Journal of the Burma Research Society, Vol.XXX (1930-31) 35.

Burmese tradition according to which a Mon Priest, named Sâriputta, at the request of King Narapatizithaw of Pagan, composed in 1174 A.D. a Code based on a Manudhammasattham. This Code was called Dhammavilâsa, after the title bestowed by the King on its author. This tradition came to us from a late source and we find an echo of it in the famous Kalyâṇi inscriptions which date back to the end of the 15th Century (15).

Another tradition, seemingly authentic, attributes to Wareru, who proclaimed himself King of Pegu on the very year of the fall of Pagan (1287 A.D.), the compilation in Mon language of another code, also based on a Pali Dhammasattham (16).

Burmese juridical literature of the seventeenth century refers to many ancient Dhammasathams written in Pali, passages of which are often quoted in the original language, according to the habit of native translators and commentators.

It may be inferred from these facts or traditions that, previously to local codes, there existed in Burma Dhammasathams composed in Pali, the oldest of which were known during the Pagan Period (17).

---

(15) E.Forchhammer, The Jardine Prize Essay, 29; J.S.Furnival, Manu in Burma: Some Burmese Dhammathats, The Journal of the Burma Research Society, Vol.XXX(1930-31) 351.

(16) R. Lingat, "The Buddhist Manu: Annals of Bhandarkar Oriental Research Institute, Vol.30 (1949) 285.

(17) R. Lingat, "The Buddhist Manu; A.B.O.R.I. Vol.30, 285; R. Halliday, The Tailaings, Ran.(1917) 136.

None of these works was transmitted to us in its original form. We have one, and even two, works bearing the name of Dhammavilâsa, but both are of the middle of the 18th century. It is possible, as Forchhammer believed, that they are, if not exactly, commentaries, at least new versions of the work written in the 12th century and alluded to in the Burmese traditions. But they may be left aside, as we are fortunate enough to possess a Burmese version of the Wareru Code.

The Wareru Code is a Mon translation of a Pali Manu-dhammasatham. This Mon version was in its turn translated into Burmese in the second half of the 16th century (between 1550 and 1560) and, according to J.S.Furnivall (18), revised in 1637 A.D. It is in this last Burmese form that the code came to our hands. Therefore, our only information about the original Pali source comes through two or even three successive translations made at dates very distant one from another. But it ought to be noticed that, in conformity with the habit of the native translators alluded to above many temms and quotations in the original work have survived the process of translation. Besides, the contents of the book bear witness to its antiquity. A comparison with other pieces of Burmese juridical literature shows at once that it is the oldest of all the Dhammasatthams

(18) B.R.S. Vol.XXX, 350.

used in Burma. Lingat, therefore, said that Forchhammer was right in paying special attention to it (19). He made an edition of it with English translation and notes in 1892 under the title: King Wagaru's Manu Dhammasattham.

The work is very short (20). It begins with the Buddhist formula of adoration of the Three Jewels, followed by an introduction stating the origin of the rules contained in the Dhammasatham. Then it enumerates the 18 branches of law, corresponding broadly with the 18 mārga of the Manusmrti. Each branch constitutes the title of a chapter under which the provisions concerning the matter are disposed. After the 18th Chapter, rules concerning witnesses are laid down. The book ends with the asseveration that a judge will go to Hell if he does not decide cases according to law, while a Judge who administers justice in conformity with the sacred precepts will attain a higher condition on his rebirth.

Forchhammer has carefully compared the legal rules in the Wareru Code with those of Hindu Smṛtis; Manu, Yājñavalkya, Nārada, Kātyāyana, and even of Dharmasūtras. He quotes many of them, such as the 18 titles of law, the 12 kinds of son, the periods a woman must wait before re-marriage, regulated according to the cause of the absence of their husbands; the partition of property among sons of different status born in

(19) B.O.R.I. Vol.30 (1949) 285.
(20) i.e. 39 pages only in the English translation.

wedlock, the seven kinds of slaves, the various kinds of incompetent witnesses, the reduplication of the punishment for this offence if two men assault a single person, etc., which are substantially the same as in the Hindu sastras (21). But he certainly exaggerates when he concludes: "There are indeed very few passages in Wagaru which are not clearly and distinctly Hindu Law as contained in Manu and other ancient codes." It cannot be denied that the Wareru Code has drawn on the Dharmasastras, especially Manu, and Nārada. This relationship is evident from the division of the matter into 18 titles and near-identity of a number of texts (22). For example Manu (23) says,

"A washerman shall wash the clothes of his employer gently on a smooth board of salamali-wood (cotton tree); he shall not return the clothes of one person for those of another, nor allow anybody to wear them."

Wagaru (24):- "If washerman wash clothes after receiving here, and instead of washing the clothes on a smooth piece of wood, beat them on a rough plank and thereby the clothes get torn, the said washerman shall replace the torn clothes; if they wear the clothes after washing them, their shire shall be forfeited. Thus has the Rishi Manu said."

---

(21) Jardine Prize, 58.
(22) Jardine Prize, 58.
(23) Manu, VIII, 396.
(24) Sec.52.

And among the references to caste in Wagaru the following may be cited (25) :-

"If a man commits adultery with a woman of royal blood, the compensation shall be four times the price of the woman's body; if with a Brahmin woman, three times; if with a Kshetrya woman (a cultivator's wife) once. Thus have the teachers of old pointed out."

But Forchhammer points out the almost complete absence in the Wareru Code of any religious feature. Hardly a trace of Brahmanical teaching is visible. "The Wagaru mentions neither Brahma, nor the Vedas, nor the sacrificial fire nor any point denoting the influence of Brahmans and of civil and religious institutions peculiar to Brahmanical India" (26). "The field of Wagaru is sufficient to explain this striking difference from the Hindu Dhamashastras. They generally consist of three parts, ācāra (sacred custom), vyavahāra (civil law) and prāyaścitta (penances), but the Wareru deals only with essentially juridical matters coming under the second head, which, even in Hindu Smṛitis is already nearly free from religious influence. It is, nevertheless, remarkable that the author of the Wareru Code, or rather of the original Manudhammasaṭṭham, did not attempt to substitute for the two other parts, viz., Holy custom and penances of the sastras, corresponding rules of the Buddhist Canon." Moreover, the

(25) Sec.52.
(26) Jardine Prize, 58.

Buddhist element, as Forchhammer also noticed, is almost completely absent from this Dhammasatham which begins with a prayer to the Three Jewels. No provision in it is founded upon a dictum attributed to the Buddha; it does not claim the authority of the Buddhist Dharma, the Good Law. The Wareru Code, according to Forchhammer is a purely civil or lay code. What is the origin of the Manu-dhammasattham on which the Wareru Code is based? Forchhammer notices that the Pali quotations recorded in it are not mere translations of the Hindu Codes. The author often uses a terminology of his own. He adopts Manu's 18 titles which he calls roots (mūlŧa), and not route (mārga), in order perhaps to avoid a confusion with Buddhist terminology, i.e. with the ariya atthangika magga (noble eight fold paths). He does not feel himself bound to follow Manu when determining the order in which he sets out his material, and the names he gives to his subjects are not always mere transcriptions in Pali of the Sanskrit technical terms. Forchhammer therefore concludes that the Dhammasatham known to us through the Wareru Code is an original piece of work. He explains the obvious kinship with the Dharmasastras by the assumption that its author utilized the same source as the author of Smritis, i.e. Hindu custom before the triumph of Neo-Brahmanism. He sees in the provision of the Wareru Code a reflection of the political and social conditions as existing in India "when Buddhism was prevailing

throughout the Peninsula." "It would be strange", he says, "if Buddhistic India, which cultivated every branch of learning, developed the mightiest and most extensive native empires, and covered the land with architectures of wonderful and stupendous magnitude, should have left us no record of its civil institution",(26A) So he assumes that the Wareru Code derives from a Buddhist civil code which emanates from a Buddhist Mānava school in India, setting out more closely the original teaching of the Hindu jurists than the subsequent Brahmanical codes. However, as one would be surprised that such a work would have remained totally unknown to the great commentators of the Buddhist Canon, such as Buddhaghosa, Dhammapāla, Vajirabuddha and Buddhadatta, he is compelled, when he tries to assign it a date, to go back at least to the 8th century. "Further researches", he says, "will probably fix the seventh, eighth and ninth centuries as the period of the rise and development of the Buddhist law of Manu."(26B). Hindu Colonies settled in Pegu were governed by that law. Codes came to them from Ceylon, or more probably Kāñci, because of its cultural role and of the early relations established between the Dekkan and Pegu. The natives of Pegu, viz., the Mons, became acquainted with them. Their monasteries were the depositories of learning; Dhammavillāsa, and a century later the priest whom Wareru consulted had only to search their libraries to find out the Code which the country needed.

(26A) E. Forchhammer, Jardine Prize, 38.
(26B) Ibid, 63

Forchhammer's ingenious hypothesis calls for careful consideration; if there is a reasonable probability of it being correct, Wareru will be a work of importance for the historian of the Hindu law.

But though it has been accepted with reservation by Julius Jolly (27) and M.M.Bode (28) as "an interesting conjecture", the probabilities are against it. It is unnecessary to insist upon the unlikelihood of the existence of a Buddhist Mānava school whose traditions survived till the 7th or 9th century. As Lingat has said, putting aside the still disputed question of the existence of a Mānava Dharmasūtra prior to the Code of Manu, those who, following Bühler, relate the Manusmrti to an old Mānava school, have in mind a caraṇa, a Vedic school connected with a saṁhitā of the Black Yajurveda. Such a school has nothing to do with Buddhism. Besides, even if the writing of the Manudhammasattham is put back to the 7th-9th centuries, the complete silence of late Pali literature points to the inevitable conclusion that no such work as Forchhammer assumes could have been generally known (29). Since Forchhammer published his book, no such Dhammasattham has been found in India or in Ceylon. The word 'dhammasattham'

(27) J.Jolly, Hindu Law and Custom, 91-93.
(28) M.M.Bode, The Pali Literature of Burma, 86.
(29) R.Lingat, The Buddhist Manu, B.O.R.I, Vol.30 (1949) 287 at 292.

meaning a Buddhist Code of civil law is not found in the Pali dictionaries. (30). All the Dhammasatthams we know came from Pegu or Burma. All these facts speak in favour of the purely local importance of the Dhammasattham literature.

Moreover, a good deal of naivety, or of boldness, is needed to see in the provisions of the Wareru Code, a reflection of the social conditions as existing in India at Asoka's time or even in the 7th to 9th centuries. The code is clear and well arranged, but its rules are expressed in sharp sentences without any nuances. It is true they show no conflict of opinions, as smṛtis do. But they also know nothing of the smrtis elaborate discriminations. They are Hindu Law, but reduced to a collection of elementary rules judiciously selected so as to be easily understood and used by uniformed judges, unacquainted with the subtleties of Indian dialectics. Compared with the smrtis, the Wareru Code is in a somewhat similar position to that of the Sentences of Paul with respect to the genuine works of the great Roman Jurisconsult. Besides, this code is not wholly Indian, and the parts of it which are not Indian clearly betray a still low stage of civilization. Many provisions show that the Wareru Code was composed for a population with primitive customs greatly different from those of India.

(30) R.Lingat, The Buddhist Manu, B.O.R.1, Vol.30 (1949) 288.

The contrast is particularly striking in the rules of law relating to the family. Whereas the Indian family is patriarchal, in Wagaru the spouses form a distinct cell, having its own property, divisible between the spouses on divorce (31). The law of marriage recognises community of property and gives the wife rights almost equal to those of her husband, institutions completely repugnant to those set out in the Dharmasastras (32). Marriage is easily dissolved, not only by the mutual consent of the spouses, but also at the unilateral desire of either, whether husband or wife (33). There is no impediment to re-marriage. In addition to the chief wife, a man may have wives of inferior status (34). All this plunges us into an 'Austro-asiatic atmosphere entirely different from that in the continent of India. It is impossible to see in this book anything else than a Mon Code, written by Mons for the use of Mons.

If we abandon Forchhammer's hypothesis, and look upon Wagaru as a work of local importance, it is easy to account for the origin of literature of this type. The Hindu colonies who had settled in Rāmaññadesa had continued to observe their own laws. Their Brahmans administered justice and decided

(31) Wagaru, Sections 42, 43, 44.
(32) Wagaru, Sec. 7, 8.
(33) Wagaru, Sec. 33, 42.
(34) Wagaru, Sec.16.

cases according to the rules of Dharmasastras. When Buddhism became the prevalent religion among them, nothing was changed with regard to the condition of laymen; they continued to be subject to the secular law, viz. the law of Manu, Buddhist communities enjoyed more freedom and security, and were able to live without hindrance according to Vinaya rules. As time went on Hindu influence was felt more and more among the native Mon population. They were hitherto governed by their own custom, which a long contact with Hindu civilization had probably improved, but they had no written law. This state of things may have lasted for a long time, and it is likely that, in conformity with Burmese traditions, the first Dhammasattham was composed at Pagan, during the period when a local Pali literature came into existence, i.e. after King Anawratha's reign. Then, as in Java during Airlangga's reign or the Majopahit Empire, the Mon Burmese population having been long Hinduized, wanted to have their own code of laws. The need was felt more acutely since the whole population professed only Himayanism, and had no reasons to accept the teaching of the Dharmasastras, the authority of which is based upon the Vedas. The Hindu colonies had for a long time mingled with the native population. The Mon priests, who were entrusted with the task of preparing a code of laws, did not unearth a Manudhammasattham that had come from India or Ceylon. It was a piece of original

writing modelled on the Brahmanical codes or, more probably, some treatise in use in the Dekkan which had been introduced by the Hindu immigrants, and perhaps still referred to by the judges of that time. For, the Vyavahāra, that part of the Brahmanical codes which deals especially with civil procedure, is substantially a technical handbook, unrelated to the Brahmanical speculations about Dharma, and it is from this part alone, as has been mentioned, that the authors of the Wareru Code have borrowed materials. Their task of de-Brahmanising the Hindu codes did not therefore encounter great difficulty. It was facilitated by the work already accomplished by the Hindus themselves in that branch of teaching which, the Nārada-smrti, had separated from the two other parts, purely religious, of the Dharmasastras. They not only laicised the code; they omitted rules which did not agree with the established usages of their country; their own customary rules they substituted. This adaptation resulted in a work undoubtedly worthy of praise, which often shows a keen understanding of law, but which was not beyond the powers of learned monks, gifted with a legal sense (35).

The lack of Buddhist influence in the Manudhammasatham and its neutrality in regard to religion, may be easily explained. The sources from which its authors drew their

(35) R. Lingat, The Buddhist Manu, A.B.O.R.I. (1949) Vol.30, 289.

materials were not Buddhist, except in the rare instances when native custom had been influenced by Buddhist morals. It may be a matter of surprise that they did not quote from the Buddhist scriptures of which they were surely conversant. The probable reason is that the Gautama laid down no rules of Civil Law for his followers. History and tradition suggest that he was particularly careful not to give offence to the Civil Officials of India and was content that, in so far as his followers needed rules of Civil Law, they should follow those of the locality in which they lived. Of course it is possible to deduce legal precepts from the principles and rules of conduct laid down in the teachings of the Buddha. But these are scattered here and there throughout the length of the canonical books and commentaries; they are nowhere collected and arranged in a methodical manner. They cover but a small part of the sphere of law. It would involve long and patient work to build up a corpus juris from them. Moreover, it is likely that the authors of the Manudhammasattham considered the law of Manu as the law still applying to the laity, and they did not think of using other sources than Dharmasastras (36).

But, as soon as their task was completed, they were faced with a very difficult problem. In composing their Dhamma-

(36) R. Lingat, Evolution of Law in Burma and Siam, The Journal of the Siam Society (1950), 16.

satthan, they had evidently intended to substitute for the Brahmanical codes a work carrying the same weight, and able to fulfil in the Mon-Burmese society the same purposes as the Brahmanical codes had done in India. But in India the Brahmanical codes were authoritative because they were regarded as a part of the smrti; the sacred tradition. They proclaimed the Transcendent Law as it had been taught by Brahma, the self Existent Being, to Manu by whom it was subsequently revealed to Holy Rishis in order that they might proclaim it in their turn and instruct men about their duties. It was to this divine revelation and to this sacred tradition that the precepts of the Dharmasastras owed their everlasting power over men. What authority could these precepts claim, once they were isolated from their Brahmanical surroundings, severed from their religious foundations? As they were not taken from the Buddhist scriptures, they could not rely upon the authority of Buddha's teaching. The forging of an ~~apocryphal~~ apocryphal sutta* probably appeared too audacious to a monastic writer. He would be anxious to retain the magic name of Manu, which was too closely connected in the Indian world with the revelation of law to be put aside without detrimental effect (37). Unfortunately Manu is hardly referred to in the Pali literature.

---

(37) R. Lingat, The Buddhist Manu, A.B.O.R.I.(1949) Vol.30, 284.

* Apocryphal sutta = Suttas or discourses which have not come down from Buddha or his disciple; Suttas of doubtful authenticity.

In order to support a claim to divine authority comparable to that enjoyed by the sastras, the Buddhist jurists invented a curious story which has made a strong appeal to the Buddhist peoples of Indo-China, for it is found as a preamble to every specimen of Dhammasattham literature. They first borrowed from the Buddhist scriptures the well-known legend of King Mahàsammata, who was a Bodhisattva when the original inhabitants of the world invited him to become their ruler. They added to this legend the story that King Mahàsammata had for his councillor a nobleman called Manu, well-versed in law. Aththe King's request, Manu, after having obtained supernatural powers, rose into the expanse of heaven, and having arrived at the boundary wall of the world, he there saw all the legal precepts carved in large letters, the size of a full-grown cow. He committed them to memory, and, on his return, communicated them to King Mahàsammata. Such is the origin given by the learned authors to the prescriptions contained in their books, and hence the name of Manudhammasattham they all bear (38).

Their intention in inventing that story is clear. They aimed at giving to the precepts of their Dhammasatthams the same authority as that enjoyed by the precepts of Dharmasastras, i.e. to present them as the expression of an immutable Law which even a king like Mahàsammata must observe, if true justice was to reign in his kingdom. Dhammasatthams would be, as

(38) Forchhammer's translation, 1.

Dharmasastras were, books of another and higher nature than records of local customary rules or usages. In a society still primitive, capable of evolution, which it might have been dangerous to enclose in its present collection of customs they would constitute a kind of ideal law, which wise rulers would be able to adjust according to the fluctuating necessities of time. Briefly the Hindu system was introduced or rather retained among people whose aspirations and system of morality differed, and was going to differ ever more widely from those of India proper (39).

However, the new law of Manu, or rather the law of a new Manu, greatly differed from the Brahmanical Law of Manu, by it being merely a civil or lay law, though still a transcendent law, concerning social organisation only. For its inner sense and the moral content to be attributed to its precepts, Buddhism was to be resorted to. Partly due to the divorce of Law from religion the law took on a new shape, and the process was hastened by breaking off all connection with Hindu Dharmasastra literature. Once Pâli Dhammasattham literature was completed, there was no occasion for further borfowing from India. On the contrary there was good reason not to do so, as India was governed by its Brahmanical institutions, while countries over which Mon influence was spreading were more and more and were subject to the influence of Buddhist precepts and averse to Hindu notions. Being thus cut off from

(39) R.Lingat, The Buddhist Manu, A.B.O.R.I. (1949), 284.

its original sources, and compelled to nourish itself with local substance, the law inevitably developed on different lines from the Hindu system (40).

Burmese legal literature appears at a very late period, a great portion of it having been composed during the reigns of Alongpaya and his successors. This may be partly explained by the fact that most of the official records and archives had been destroyed when Ava fell to the Mons in the middle of the 18th century. But it is very likely that the Burmese, during the Pagan period and a great part of the Ava period, had no code of laws of their own, and relied upon Pâli Dhammasatthams composed in the period of Mon cultural influence. This is evident from the fact that King Wareru's Mon version of Manudhammasattham was twice translated into Burmese, first at the end of the 16th century, then in 1637.

However the first translation of the Wareru code seems to have given an impulse which created a national juristic literature to which additions ceased only with the British conquest of Burma. This literature is very vast. A list given in the Pitakat Thamaing, a history of Burmese literature published in 1888, enumerates more than 100 Dhammasattham, in Pali or Burmese, in verse or in prose (41).

---

(40) See R.Lingat, Evolution of Law in Burma and Siam, The Journal of the Siam Society, Vol.XXXVIII, Jan.1950, 16.

(41) J.S.Furnivall, Manu in Burma, The Journal of the Burma Research Society, Vol.XXX, (1930) 352.

In all these works, the story of Manu as a councillor of King Mahasammata is told, with new details added. In some of them, Manu becomes an incarnation or a son of Brahma, born as a hermit. Others give him a brother called Manu who accompanied him in his daring flight. Others make him a shepherd, distinguishing by his precocious wisdom in settling disputes among people. King Mahasammata having heard of him, asked him to become his councillor. Manu complied with the royal request, but only after a seven days probation during which he had to try a new case everyday. The first six days he gave sentences approved by all. But on the 7th day when a claim between two neighbours concerning cucumbers was submitted to him, he made a wrong decision. He then asked for leave to retire to the forest, where he lived as a hermit, acquiring supernatural powers which enabled him eventually to soar over to the boundary wall of the world, and become acquainted with the divine law (42).

By the time of Alongpaya palpably Buddhistic matter had found its way into the law of Manu. The author of Manugye prefaced Manu's story with a cosmogonical introduction drawn direct from Buddhist sources. Passages from Canonical books

(42) Dr.Htin Aung, "Customary Law in Burma", The Fifth Anniversary, Burma, Vol.III No.2, 61;
R. Lingat, Evolution of Law in Burma and Siam, J.S.A. Vol.XXXVIII, Pt.1, 10 at 15.

are intermingled with rules of ancient Dhammasathams, and are often incorporated with them. Thus, in order to justify the rule that children must, in certain cases, pay debts contracted by their parents although unknown to them, the author of Manugye, who is fond of anecdotes, which he relates in a particularly attractive manner, tells a story which happened during Dipankara's time, according to which the daughter of a dead woman became blind because she had refused to pay her share of her mother's debt on the ground that she was not born at the time when the debt was incurred. When, on Dipankara's advice, she paid the debts, she recovered her eye-sight at once (43). Likewise, to support the rule according to which a wife should not be put away on the ground that she had borne no male child, he relates the story of a King of Benares who had had only daughters from his wife, though he had been a father eight times; he acquired nevertheless meritorious satisfaction, three of his daughters having attained the highest degree of sanctity. These stories are both borrowed from the Jaitakas, a book in the Pali canon (44).

This last example will serve to illustrate the difference in tone and spirit between the ancient Dhammasattham and the modern codes. Those belonging to what may be called the Mon

(43) Manugye, Bk.III, sec.35.
(44) Manugye, 355-356;
Digest, II, sec.266;
See R.Lingat, Evolution of Law in Burma and Siam. J.S.C. (1950) 16-17.

period of Burmese law are very close to their Hindu models. The Buddhist influence only makes its influence felt very discreetly and is confined to the wording. The rules are set out in the aphonistic style of the Dharmasastras. They are expressed in brief imperative formulas, and are rarely supported by anything more than the assertion "Thus spoke the Rishi Manu", corresponding to the manur abravit, Manu dixit of the Hindu Codes. The Dhammasattham of the real Burmese period retain the ancient rules, but they add a mass of regulations in which the influence of Buddhism is openly expressed (45).

3. Manugye.

It would have been open to the British government to follow the ancient practice of issuing a fresh and authoritative code. But it was more in accord with the genius and practice of the British, when incorporating the various races and population within the Empire, to apply existing native laws to family and religious matters in so far as they contained a working system of jurisprudence in accord with the traditions and habits of the people. The latter course was therefore adopted in Burma (46); at the time of the English conquest, the Dhammasattham constituted the only written law of Burma. In 1898 the British government commissioned the Ex-Kinwûn Mingyi (the Honourable U Gaung) to produce a fresh Digest of thirty-six

(45) R. Lingat, La Conception Du Droit Dans L'Indochine Hinayaniste, B.E.F.E.O. Tome XLIV - 1947-50, page 1, 163-180.

(46) A.Eggar, The Laws of India and Burma, 13.

Dhammathats in order to facilitate the task of the new judges (47). It is rather surprising that the Attansankhepa - the Dhammathat which he himself had written has not been included in his comprehensive Digest published by the sanction and under the authority of the Government of Burma after the annexation. It is only mentioned as an incidental reference in section 259 of the Digest, Volume II. A list of the thirty-six Dhammathats in chronological order as drawn up by the Kinwun Mingyi, is reproduced here (48).

(47) A. Eggar, The Laws of India and Burma, 13.
(48) Digest I, Sec.4; U Chan Toon, The principles of Buddhist Law, 5.

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
1	Manosâra, in Pâli.	Mano	-	-	The list is headed by this Dhammathat because its introduction says that it was presented by the Rishi Manosara to King Mahâthamada. On the other hand the History of the Pitakat says that the same work was compiled by eight judges during the reign of the Taunguyaukmin, son of Sinbyuyin, king of Hanthawaddy, and that it is also known by the name of Dhammathatkyaw.
2	Mânussika, prose.	Mânussika	-	-	The second place in the list is accorded to this Dhamma-that because its introduction says that it was presented to King Mahâthamada by the Rishi Manu. The history of the Pitakat, however, says that it was compiled by the Rishi Gawunpate and the Thagyamin during the time of Kassapa Buddha.
3	Pyu-min, in Pâli.	Pyu	89	727	It is stated in the Dhamma-that that the work was com-piled in Pâli in the year 89 B.E., by Pyu-mindi, king of Pagan, the Thagyamin, and a Rishi; that it was sub-sequently translated into Talaing by the kings of Ramannadesa; and that during the reign of Sinbyu-yin, king of Hanthawaddy, the work was translated into Talaing and edited by Bud-dhaghosa, at the instance of the Crown Prince. The History of the Pitakat, how-ever, says that the Dhammathat ascribed to Pyumindi is another work.

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
4	Dhamma-vilâsa, prose.	Vilasa.	455	1093	The introduction says that it is an abridged edition of the Manu Dhammathat by Dhammavilâsa. The History of Pitakat says that it is based on the Manuyin Dhammathat and was compiled during the reign of Narapatisi-thu, king of Pagan, who ascended the throne in 455 B.E., by Dhammavilasa, a native of Patippateyya village in Dala district, whose monastic name was Sariputtara, and whose title was Dhammavilasa.
5	Waru, in Pâli.	Waru	643	1281	The introduction says that it was originally compiled in Talaing on the basis of the Manu Dhammathat, at the instance of Waru, king of Martaban, and that it was translated into Burmese by Buddhaghosa. The Life of Yazadarit says that Magadu became king of Martaban in 643 B.E., and in a hall constructed in the centre of the town, a Dhammathat was compiled by an assembly of learned men, and the compilation was known as Waru Dhammathat after the title assumed by the king. This statement is confirmed by the list of Dhammathats appended to the History of the Pitakat.

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
6	Dhamma-that Kungya, prose.	Kungya	788	1426	According to the preface it was written in four volumes, in 75 B.E. by Min-pyan, Pagan Prince, having for its basis an old Dham-mathat, which contained more rules than the Manu, Mano, Dhammavilàsa, and Manussika Dhammathats, and which was written as far back as 11 B.E. The old Dhammathat was in the possession of Sadaw Maha-sangharajadhamma, who resided at Pagan, in the gilt monastery built by Mohnyinmindayagyi, who ascended the throne of Ava in the year 788 B.E. In the history of the Pitakat, it is not found mentioned as Dhammathat-Kungya, but as Paganpyanchi and Lezaungdwe.
7	Kaingza Shwe Myin, in Pàli.	Kaingza	991	1629	The preface states that it was written by Rishi Manu-sara and given to King Mahathamada. There is no epilogue. The History of the Pitakat says that the Dhammathat handed down from King Mahâthamada was edited by Manurâjâ Amat, "eater" of Kaingywa village, with the help of the famous priest of Taungpila during the reign of Thaluhmindayagyi, builder of the Râjamani-cula pagoda, who ascended the throne in 991 B.E.

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
8	Mahayaza-that, prose.	Yazathat	991	1629	In the preface it is said that it was written by Manuraja Amat, Judge and "eater" of Kaingywa village, in compliance with the request of Thalumindayagyi, who ascended the throne of Ava in 991 B.E. The year of the completion of the work is not mentioned. The same account appears in the History of the Pitakat.
9	Myingun, verse.	Myingun	1012	1650	The preface states that it was written by a monastic pupil of the Ledatkyaung Sayadaw of Sagaing, while residing at Taungbaw kyaung in his native town of Myingun, and that it was completed in 1012 B.E. The name of the author is not expressly mentioned. According to the History of the Pitakat, it was written in 1012 B.E. by thero Dhammavilâsa, in a kyaung, on a hill, at Myingun. He was a pupil of the Sayadaw, who resided in a kyaung near Shwezigon pagoda, which was built by Minkyizwasawke of Ava.
10	Dhamma-thatkyaw, prose.	Dhamma-thatkyaw	1095	1733	The preface states that it was compiled from Manu, Mano, Dhammavilâsa, and Dhammathatkyaw by Mahâ Buddhinkûra, Sayadaw to Hanthawaddy-yauk-min, builder of the Lokatharapiu pagoda, who ascended the throne of Ava in 1095 B.E. The year in

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
					The year in which the work was completed is not mentioned. In the History of the Pitakat, the same work appears under the different name of Lezaung-dwè Dhammathat, and is said to have been compiled from four Dhammathats, Manu, Mano, Dhammavilasa and Dhammathatkyaw, by thero Nânadhammavilàsa, who resided in a 4-storied kyaung, erected on the north-west of Mahamyatmu-ni pagoda, by Nyaungyan-mindaya the second king of Ava.
11	Dhamma-vinicch-aya, prose.	Dhamma	1114	1752	The preface states that it was written by Letwen-andasithu, one of the ministers. The year of completion of the work is not mentioned. According to the History of the Pitakat, it was written by Judge Letwèbinanthu, during the reign of Alompra, founder of Shwebo, who ascended the throne in 1114 B.E. In this also the year in which the work was com-pleted is not mentioned.
12	Manugye, prose.	Manugye	1114	1752	Neither the name of the author nor the year of the completion of this Dhammathat is mentioned in the work itself. According to the History of the Pitakat, it was written by Bhummajeya Mahâsiriuttamajeya Thing-yan, Wun in charge of the moat of the city of Shwebo during the reign of

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
					Alompra, who ascended the throne in 1114 B.E.
13	Kandawpa-keinnaka-linga, verse.	Kandaw	1120	1758	The preface says that it was written by thero Lankàsàra in the year 1120 B.E. According to the History of the Pitakat, it was written by U Tun Nyo, whose title was Mingyi Mahasithu, Wun of Twinthintaik. It is, therefore, believed that it must have been written while he was still a monk.
14	Shintez-awtharase-wemyin, in Pâli.	Tejo	1122	1760	The preface says that it was translated from the Pali by thero Tezawthara, at the solicitation of Mingyi Minkyawdin, Prime Minister at the time of Sagaing Minda-yagyi, who ascended the throne of Shwebo in 1122 B.E., with the title of Sihasûramaharaja. It is not found in the list of Dhammathats given in the History of the Pitakat.
15	Vaṇṇadha-amma Shwemyin, in Pàli.	Vaṇṇadh-amma.	1125	1763	The preface says that, in consequence of errors having, in the course of time, crept into the Manusàra Dhammathat, which was handed down from King Mahàthamada and successively edited during the reigns of Pyumindi, king of Pagan, the Talaing kings, Sinbyuyin, king of Hanthawaddy and

No.	Name of Dhamma-that.	Abbrev-iation.	Date of Com-pilation. B.E.	A.D.	Remarks.
					Thalunmindayagyi, it was again edited by Vaṇṇadhammakyawdin, Atwinwun in the reign of Sinbyuyin, the third king of Ava, who ascended the throne in 1125 B.E. According to the History of the Pitakat it was compiled by Atwinwun Vannad-hammakyawdin Mahàzeya-thura, from the ten volumes of the original Manusâra Dhammathat, in Pali, which had been edited by Judge Manuràjâ "eater" of Kaingywa, in conjunction with the well-known monk of Taungpila.
16	Manuan-ṇanâ, verse.	Vaṇṇanâ	1129	1767	The preface says that it was written in 1126 B.E. by a pupil of the Taungdwin Sayadaw, who received the title of Nânâlankâra, Mahâra-jaguru. According to the History of the Pitakat, it was written by Mingyi Mâhàsithu, Wun of Twinthintaik. It is believed that the Taungdwin Sayadaw's pupil was no other than the Wun of Twinthintaik. The Manuvaṇṇanâ in verse is placed in this list before the Manu-vaṇṇanâ in Pàli, written by Vaṇṇadhamma, because the former was not based on the latter, but was composed 8 years previous to it.

No.	Name of Dhamma-that.	Abbreviation.	Date of Compilation. B.E.	A.D.	Remarks.
17	Manuyin,	Manuyin	1129	1767	The preface says that the work was completed in 1129 B.E., without mentioning the name of the author. According to the History of the Pitakat, it was composed by the Wun of Twinthintaik.
18	Vinicchaya-râsî, prose.	Râsi	1129	1767	The preface says that the work was completed in 1129 B.E., but it does not mention the name of the author. According to the History of the Pitakat it was written during the reign of Hanthawaddy-yauk-min by thero Khemacara, a native of Mèdi village, near Popa, and a pupil of Patama-Kyaw Hungsanda Sayadaw.
19	Vinicchaya-pakâsanî, in Pâli.	Vinicchaya	1133	1771	The preface says that it was written by Vannadhammakyawdin Amat in 1133 B.E. during the reign of Sinbyuyin, the third king of Ava. According to the History of Pitakat, Vannadhammakyawdin Mahazeyathu, Myoza of Yindaw, Wun of the nine Northern Troops of Cavalry, and Atwinwun during the time of King Sinbyuyin, put into Pali together with a translation the Mahâyazathat, which was written in compliance with the request of King Thalunmindayagyi, by Manurâjà Amat, Judge, and "eater" of Kaingywa.

No.	Name of Dhamma-that.	Abbrevia-tion.	Date of Com-pilation. B.E.	A.D.	Remarks.
20	Manu-vaṇṇanâ, in Pâli.	Manuvaṇ-ṇanâ.	1134	1772	The preface says that it is an amplification of Manu Dhammathat by Amat Vaṇṇadhammakyawdin, made in the year 1134 B.E., during the time of King Sinbyuyin. The same account of it is given in the History of the Pitakat.
21	Vinicchaya-pakâsanî, verse.	Pakâsanî	1139	1777	The preface says that it was written by Letwèthôndara in 1139 B.E. In the History of the Pitakat also it is said that it was written by Judge Letwèthôndara, whose ordinary name was U Myat Pan.
22	Mohavic-chedanî, in Pâli.	Viccheda-ni.	1139	1777	The preface says that it was written in 1139 B.E. by Amat Râjabalakyawdin, during the reign of King Singu. In the History of the Piṭakat also it is said that the work was written by Amat Râjabala, that he was a native of Chaunggauk village in Pakangyi district, and that he entered the service as Atwinwun and was "eater" of Thetpan village during the reign of the first king of Amarapura.
23	Râjabala, in Pâli.	Rajabala	1142	1780	The preface says that it was written in 1142 B.E., by Amat Râjabala, at the request of Prince Pa-ganmin, during the reign of King Singu. It is not given in the list of Dhammathats in the Histor of the Pitakat.

No.	Name of Dhamma-that.	Abbreviation.	Date of Compilation. B.E.	A.D.	Remarks.
24	Sônda-manu, in Pâli.	Sônda	1143	1781	The preface says that it was a translation into Pâli of the Manu Dhamma-that in prose, by monk Nandamâlâ, a native of Paukmyin village, in Bagyi circle. According to the History of the Pitakat, it was written by the Sayadaw, whose monastic designation was Nandamâlâ, and whose seal as a Sayadaw bore the title of Nandamâlâbhi-vamsa Siridhaja Mahâd-hammarâjâdhirâjaguru, during the time of the first king of Amarapura, who ascended the throne in 1143 B.E. The Syay Sayadaw was known as Sônda Sayadaw, owing to the fact of his leaving Sinbyugyun and residing at Sonda village in Bagyi circle, and the Dhammathat was called after him as the Sônda Dhammathat.
25	Manu, in Pâli.	Manu	1143	1781	The preface says that during the reign of the first king of Amarapura, who ascended the throne in 1143 B.E., one Maung Myat Thi, whose name as a monk was Ketuja, a native of Wunkyi village in Tabayin district, wrote in Pali the Manu Dhammathat and its commentary at Amarapura; and that the translation of the above work was made by Sayadaw Lankârâma during King Mindon's reign. No mention is made

No.	Name of Dhamma-that.	Abbreviation.	Date of Compilation. B.E.	A.D.	Remarks.
					of this Dhammathat in the History of the Piṭakat.
26	Pânam Pakinnaka, verse.	Pânam	1143	1781	The preface says that it was composed by Pânam Wungyi, Mingyi Sîrimahâsîhasû, during the reign of the first king of Amarapura. The year of the completion of the work is not given. No mention is made of it in the History of the Piṭakat.
27	Rescript	Rescript	1146	1784	Contains order issued in 1146 B.E., during the reign of the first king of Amarapura.
28	Vinicchaya-kungya, verse.	Kungyalin-	1146	1784	The preface says that it was written in 1165 B.E. by Maung Pe Thi, whose title as clerk in charge of the Royal boats was Pyanchiwethaw. No mention is made of this Dhammathat in the History of the Pitakat.
29	Dâyajjadipani, verse.	Dâyajja	1173	1811	The preface says that it was written in 1173 B.E., by an advocate bearing successively the titles Candasû, Candasûra and Sithunandameikkyadin. It is not mentioned in the History of the Pitakat.
30	Waru, verse.	Warulinga	1184	1822	The preface says that it was written in 1184 B.E., by one U Shwe Po, bearing the title of Râjakyawthu. According to the History

No.	Name of Dhamma-that.	Abbrevia-tion.	Date of Com-pilation. B.E.	A.D.	Remarks.
					of the Pitakat, it was written by Maung Po, a native of Ywamun village, in Alon district, who was tutor to Shwedaung Mintha, son of the first king of Amarapura.
31	Dhammas-àramañjû, verse.	Dhamma-sâra.	1207	1845	The preface says that it was written in 1207 B.E., by Theinkasithu-gyaw, clerk to the Moda Wundauk.
32	Amwebôn, prose.	Amwebôn.	-	-	According to the History of the Piṭakat, the work which contains over a hundred cases bearing on the law of inheri-tance was written by the Monywe Sayadaw and Judge U Shwe Pu, who built the Jetavam monastery at Monywa.
33	Manu-cittara, verse.	Cittara	-	-	The work has no preface. The author and the year in which it was written are not known. In the History of the Piṭakat it is simply stated that it was written by an unknown monk.
34	Shinthapa	Shinthapa	-	-	The work says that it was written by Shinth-apa, but it does not say in what year. No mention is made of it in the History of the Piṭakat.

No.	Name of Dhamma-that.	Abbrevia-tion.	Date of Com-pilation. B.E.	A.D.	Remarks.
35	Kyetyo	Kyetyo	-	-	) The names of authors) and the years of) the completion of
36	Kyannet	Kyannet	-	-	) the works are not) given in these works.) Neither are they) mentioned in the) History of the) Pitakat.

On all questions of family law among Burmese Buddhists they remain until today the main written source of the law. But, before the British period, Dhammathats rules were not positive law. Before being applied in the adjudication of suits, they had to be examined in the light of the existing state of things. A well established usage would prevail over them (49). Lahiri said, (50), "Buddhist Law is not the law of the Dhammathats pure and simple, but it is the body of customs observed by the Burmese Buddhists."

The most representative of the Dhammathats is the Manugye, which has been translated into English by D.Richardson, Assistant to the Commissioner of Tenasserim Provinces, in 1847, under the title: THE DAMATHAT OR THE LAWS OF MENOO. It is in fact a kind of digest, composed of extracts from former Dhammasatthams, which are placed one after the other without trying to clear up their discrepancies (51).

Of the thirty-six Dhammathats contained in the Kinwun Mingye's Digest of Burmese Buddlist Law, the courts attach paramount importance to Manugye which to this day 'is the most widely read and studied law book in Burma, and after the British had taken possession of this province, the natives pointed to

(49) R.Lingat, Evolution of Law in Burma & Siam, J.S.S.,(1950) 72.
(50) Burmese Buddhist Law, 1.
(51) R.Lingat, Evolution of Law in Burma & Siam, J.S.S.,(1950) 22.

this Dhammathat as containing the body of laws by which they had been governed (52)'. In Ma Hnin Bwin v. U Shwe Gon (53) their Lordships of the Privy Council perpetuated its authority by the dictum that where it is not ambiguous, the Courts need not refer to any other Dhammathats for guidance.

Sir John Jardine said (54): "The Manukyay appears to me fuller than most of the Dhammathats. But in the present dearth of learning, it is as difficult to appraise its authority as to determine its age or the name of the author. Maung Tet Too, after instituting enquiries at Mandalay, discovered no clue to these secrets. Dr.Richardson mentions none. No Pali edition is known and it is probably a compilation made from other Dhammathats. Several Judges have spoken to me of the Manoo Wonnana, the Manoo Thara Shwe Myin and the Manoo Thaya Paka Thani as being authorities superior to the Manukyay."

In the History of Piṭakas, Mainkaing Myosa, who was the Royal librarian in the reigns of the last two kings of Burma states of the Manugye that it is the work of Bhummazeya Mahathiri Uttamazeya Thinkyan, Minister of the Moot at Shwebo in the reign of Alaungpra, the founder of the capital city of Shwebo in 1115 B.E., and is an expansion into 18 volumes in

(52) Jardine Prize Essay, 204.
(53) (1914), 8 L.B.R.I. (P.C.).
(54) Notes on Buddhist Law, part III, iii.

plain Burmese prose of the ten volumes of the Manu Dhammathat.(55)

The Kinwun Mingye's Digest follows the history of Pitakas specifically citing that authority in regard to the authorship of the Manugye, noticing also that neither the name of the author nor the year of the completion of the work of the Dhammathat is mentioned in the work itself (56).

A little over a year after Sir John Jardine had professed inability, in spite of researches at Mandalay, to trace the authorship and date of the Manugye, Dr.Forchhammer stated (57):

"In the year 1756 Alompra requested Mahasiruttamajaya, the Minister of Military Works, to compile a code comprising the customary law and usages in force in his dominions; he wrote the well known Manukyay which has been translated into English by Dr.Richardson; this law book is written in plain Burmese with very little Pali intermixed."

The learned Professor did not state his authority for the claim that the compilation of the Manugye was at the request of the king; instead he let the validity of the claim to be inferred from what he considered to be the practice of the Burmese and Talaing kings:-

---

(55) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108 (S.C.) at 117
(56) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108 (S.C.) at 111
(57) Dr.E.Forchhammer, Jardine Prize Essay, on the sources and development of Burmese Law, 1.

"A Burmese or Talaing Ruler, after having abolished all existing hereditary institutions, would proceed to compile a new code of law and bestow his benefits upon individuals of his own choosing. In minor matters he would allow the different nationalities and religious bodies of his dominion to be governed by their own laws and customs." It was apparently on the authority of Dr.Forchhammer that in Ma Hnin Bwin's case (58) the Privy Council said,

"There can be little doubt that in the middle of the 18th century of the Christian Era, the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of state to place the jurisprudence of his country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the Royal authority are Dhammathat in prose, known briefly as the Dhamma. Another, in charge of the Moat of the city of Shwebol and taken by Dr.Forchhammer to have been Alompra's Minister of War, compiled in prose the Manugye or Manukyay Dhammathat, and it is this document last mentioned which was issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of 170 years."

On this authority the Privy Council held that where Manugye is clear on any point in dispute, "the other Dhammathats do not require to be appealed to to clear up any ambiguity."

(58) (1914) 8 L.B.R. 1 (P.C.).

It is difficult to find in Dr.Forchhammer's Essay definite indications of materials on which to found the conclusion that a new ruler would proceed to compile a new Code of Law. Indeed, so far as relates to what may be shortly described as civil law, materials extant point in the contrary direction. The innate conservatism of the people and the high respect in which kings and common people held ancient traditions would not favour revolutionary innovations. Copies of the Royal edicts of Thalunmitra who came to the throne at Ava in 991 B.E. (1629 A.D.) and of Bodawpaya, are still available (59); and these edicts enjoined Judges and the common people to enforce and respect the dictates of ancient Dhammathats. Dr.Forchhammer himself noticed this (60).

"Every great Burmese or Talaing monarch endeavoured to preserve existing laws (but not hereditary institutions) and to enact and enforce new ones suitable to the customs and usages of the people for whom they were intended."

The Manusara Dhammathat, also known as Kaingza Shwe Myin,

---

(59) e.g. Royal edicts of 1146 B.E.(1784 A.D.). "If the unlettered peasant, through ignorance of law, should, in relation to hereditary office or appendage or theft or rapine or in respect of other legal claims, raise inappropriate pleas, instruct him what to plead, how to present his petition and to support them by appropriate argument, having due regard to the Manu Dhammathat, the Mano Dhammathat, the Shwe Myin Dhammathat, Royal edicts, ancient precedents and judicial decision."
See in Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R.187 (S.C.).

(60) Jardine Prize Essay, 91.

which Dr.Forchhammer (61) confounded with Mahayzath (cited as Yazathat in Kinwun Mingyi's Digest) was prepared in 991 B.E. (1629 A.D.).

The text is in Pali. The opening passage of the text which is divided into 10 volumes or chapters reads (62),

"In the beginning, King Mahasamata, who ruled over the original inhabitants of the world and who was possessed of wisdom enabling him to accomplish all that he undertook, longed for laws to regulate the settlement of all disputes. To him was accorded these laws; and in the reigns of his descendants, these laws spread over the face of the earth. Later when Byumandi ruled over Pagan, three eminent persons namely, King Byumandi, the King of Davas and the Rishi prepared, for the benefit of posterity who could thereby ascertain the laws, a Dhammathat in Pali concisely recording these laws. When later this Dhammathat reached the country of Mons, the holy priest who resided in the Royal Monastery, for the better understanding of the contents of the Dhammathat, translated it into the Mon language. Later in the reign of the Glorious Ruler, the Lord of white elephants (Dhammaceti, 1473 A.D.) Mahathero Buddhaghosa, at the request of the crown prince, replete with all desirable qualities mental and physical, and having in view

(61) Jardine Prize Essay, 90 and 105.
(62) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108, (S.C.) at 117.

the good of the community prepared from the Mon text a new version of the Dhammathat."

The third volume or chapter of this text ends with,

"The great and glorious monarch, who has bestowed on his people living in divers towns and villages the blessings of prosperity and whose power is limitless, having entreated the revered Royal Mantor, residing in Taungpila 1, Manuraja, Judge and Lord of Kaing village, under the guidance of the revered Royal Mantor have herein revised the Dhammathat translated by Buddhaghos."

It may be remarked that the manuscript of this text, then in the library of the Kinwun Mingyi at the court of the Burmese king was not available to Dr.Forchhammer when he wrote his essay and he was led into the error (63) that Vaṇṇadhamma Shwemyin of Woona Dhamma Kyaw Din cited in the Kinwun Mingyi's Digest as Vaṇṇadhamma, is only the Wagaru and the Maharaja Dhammathat (or the Mahayazathat of the Digest) more fully developed with additional materials from Manugye in the legal literature of Burma and its authority. A close comparison of the text of Manusara Dhammathats of Kaingza with Woona Dhamma Kyaw Din Vaṇṇadhamma reveals that the latter faithfully follows and is a commentary on the former. Vaṇṇadhamma is in the direct line of descent from the original Wagaru though the

(63) Jardine Prize Essay, 105.

translation of Buddhaghosa, from which Kaingza Manuraja, under the direction of Taungpila Sayadaw and at the request of King Thalun Mintra prepared the Pali text in 991 B.E. (1629 A.D.) of the Manusara or Kaingza Shwemyin Dhammathat.(64)

U E Maung, J., therefore, said (65) that the Manugye Dhammathat is not the paramount authority in the body of Dhammathats as enunciated by the Privy Council in Ma Hnin Bwin v. U Shwe Gon (66), followed by the High Court of Judicature at Rangoon in Ma Nyun v. Maung San Thein (67). He said further (68),

"An examination of all the relevant texts from the Dhammathats must therefore be undertaken before the point at issue can be correctly determined. A word of caution, here, seems necessary. Dhammathats are not statutory enactments and the principle of equitable construction, which is discountenanced in interpreting legislative enactment cannot be excluded when seeking the meaning of the texts in the Dhammathats."

---

(64) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R.108 (S.C.)
(65) ibid.
(66) (1914) 8 L.B.R.1.
(67) (1927) 5 Ran.537.
(68) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R.108 (S.C.)

CHAPTER V.

EXTENT OF APPLICATION OF BURMESE BUDDHIST LAW

1. Conflict with foreign customary Laws.

After the British annexation of Burma, it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognized and respected.(1) Hence Burmese Buddhist Law was applied by the courts in Burma in questions regarding succession, inheritance, marriage or caste, or any religious usage or instruction, when the parties were Buddhists, except in so far as such law had been altered or abolished by a legislative enactment, or was opposed to any custom having the force of law in Burma (2). This rule, applied immediately after the conquest was ultimately expressed in the Burma Act (XIII of 1898), section 13 in the following form:-

"(1) Where in any suit or other proceedings in Burma it is necessary for the court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

(a) the Buddhist law in cases where the parties are Buddhists.

(b) The Mohammedan law in cases where the parties are Mohammedans, and

(c) the Hindu law in cases where the parties are Hindus, shall

(1) Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932) 10 Ran, 97 at 103.
(2) Sec.4, Burma Courts Act. (VII of 1875).

form the rule of decision.

Except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-section (1) and of any other enactment for the time being in force, (all questions arising in civil suits instituted in the Courts of Rangoon shall be dealt with and determined according to law for the time being administered by the High Court of Judicature of Fort William in Bengal in the exercise of its original civil jurisdiction)(3).

(3) In cases not provided for by sub-section (1) or by sub-section (2) or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience".

(4) This section does not extend to the Shan States".

Section 13 of the Burma Laws Act ~~exports~~ expands the principle laid down in Warren Hastings' Ordinance of 1772 prescribing the law to be administered in the East India Company's then recently established muffassal civil courts in Bengal, and subsequently embodied in similar legislation for all parts of British India(4).

After the institution of the Republic, by virtue of article 226 of the constitution of Burma, the above section continues as an existing Law.

It is clear from sub-section (1) that Buddhist law is purely local and is not therefore, applicable to the Buddhists

---

(3) Omitted by sec: 2 of Rep. & Amending Act (ii) of 1945
(4) See Tan Ma Shwe Zin v. Koo Soo Chong, (1939) Ran.548 (P.C.)

living abroad. It is also a condition precedent that both parties to the suit or proceedings shall be Buddhists.

By Buddhist Law is meant the customary law of the Burmese who in general, profess the Buddhist religion. It has nothing to do with the Buddhist doctrine as preached by the Lord Buddha. As Page C.J. remarked in Phan Tiyok v. Lim Kyin Kauk (5), "Burmese customary Law is regarded as Buddhist Law, not because it is part and parcel of the Buddhist religion, but because it is the personal law that governs the Burmese who are Buddhists".

But the term "Buddhists" in sub-section (1) of Section 13 of the Burma Laws Act relates prima facie to all Buddhist inhabitants of Burma. It applies to all indigenous races of Burma who profess the Buddhist religion. Shan States are expressly excluded from the operation of section 3(4).of the Burma Laws Act and under sub-section 2 of section 11 of the Act, the law to be administered is the customary law of the State in so far as it is in accordance with justice, equity and good conscience. But Shan Buddhists have no separate personal laws apart from that of Burmese Buddhists. It was held that Burmese Buddhist Law is prima facie the personal law of Stan State(6). It may be said that the prohibition in sub-section (4) is no longer effective.

The question whether it includes the Buddhists of foreign

---

(5) (1930).8 Ran.57. (F.B.).
(6) Ma Shwe Yin v. Mg.Ba Tin, (1923) 1 Ran.343.

nationalities has often been mooted before the Courts in Burma. Although in Ma.Tin v. Doop Raj Barua (7) Burgess, J.C., remarked of a Mug coming from Chittagong, "Prima facie, as a Buddhist deceased would come under the Buddhist law of the Country at large and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance", it was taken until 1939 generally to have been judicially settled that Burmese Buddhist Law is not applicable to the determination of questions of succession or inheritance to the estate of Buddhists of foreign nationality residing in Burma (8).

This view however was challenged before the Judicial Committee of the Privy Council in Tan Ma Shwe Zin and others v. Koo Soo Chong and others (9). In that case, the Rangoon High Court had held that Chinese Customary Law governs succession to the estate of Chinese Buddhist domiciled in Burma, inasmuch as there is no Buddhist Law applicable to Chinese Buddhists. In appeal to the Privy Council, Sir George Rankine remarked "Had there in fact been a settled course of Judicial decisions in Burma upon the question, their Lordships would have been loath to disturb it. But from their review of decisions it is abundantly clear that the important question now before the

(7) (1892-96) 11 U.B.R. c1892-96 608.
(8) Chan Pyu v. Saw Sin, (1928) 6 Ran.623;
Phan Tiyok v. Lim Kyin Kauk, (1930) 8 Ran.57 (F.B.);
Tan Ma Shwe Zin v. Tan Ma Ngwe Zin, (1932) 10 Ran.97 & the cases cited therein.
(9) (1939) Ran.548 P.C.

Board cannot be answered upon the mere principle of stare decises. At the highest it may be said that there is a substantial preponderance of opinion against applying Burmese Buddhist Law to the case of a Chinaman who was a Buddhist. As to the consequence of the opinion of the choice between Chinese Customary Law and the principles of English Law or the Indian Succession Act, the decisions are not settled but conflicting. The matter must now be determined upon the words of section 13 as a question of construction". Their Lordships further said that difficulties in the application of that section had arisen out of the immigration into Burma, of Chinamen, some of whom profess the Buddhist faith, although there is no Chinese form of Buddhist Law. It was pointed out that, as regards succession and inheritance, the Chinaman who is a Buddhist is, in China, governed by customs and laws which are not connected with the religious beliefs of the Buddhists, and which are applied equally to Chinamen who are not the Buddhists. Dealing with all relevant authorities on the subject, their Lordships concluded that a Buddhist, comes within the term "Buddhists" in clause (a) of sub-section (1) of section 13 of the Burma Laws Act, 1898 and that he cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist, or because the law which governs him in China is not specifically Buddhist or even a religious law. Their Lordships recognised that some difficulty and inconvenience would arise from applying to Chinese Buddhists, a law different from that applicable to

them in China, but they considered that to be a matter for reconsideration by the legislature. The influx of Chinese into Burma might not have been anticipated or the relation between religion and law might have been imperfectly understood when the rule was first introduced. In their Lordships' opinion, "it is a problem de lege ferenda and is not to be solved by interpreting the section in a sense of which it does not admit". Expressing complete agreement with the decision of Burgess J.C., in Ma Tin v. Doop Raj Barua (10), their Lordships held that prima facie, inheritance to the estate of a Chinaman who was domiciled in Burma and was Buddhist, is governed by the Buddhist Law of Burma, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance. This decision, it is submitted, implies that the Buddhists of all nationalities domiciled in Burma are, in the absence of proof of custom having the force of law, governed prima facie by Burmese Buddhist Law, in matters relating to succession, inheritance, marriage or caste, religious usage and institution. All previous decisions of the Rangoon High Court on the point to the contrary have thus been over-ruled. It is submitted that Page C.J.'s view, though over-ruled, is the better view, because if the intention of the legislature in passing the enactment is steadily borne in mind when the construction of the section is under consideration, its meaning and effect is free from difficulty.

---

(10) (1892-96) 11 U.B.R. 608.

Page C.J., therefore, said,(11) "It is a fundamental principle of British Imperial policy that, so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognised and respected. I have no doubt that the legislature intended to give effect to this principle when section 13 was enacted. But the language in which the section is couched is unfortunate. It would be neither reasonable nor feasible to construe the section in any other sense. It follows, therefore, that the question to be determined in the present case are to be decided by reference to the personal law of the Chinese Buddhists in Burma, which prima facie is Chinese customary law".

Of the effect of section 13 of the Burma Laws Act on questions relating to marriages between a Burmese Buddhist and a Buddhist of a foreign race, the pronouncements were not consistent in the past. It has never been doubted that a valid marriage is possible between them, but the judicial requisites laid down for compliance seem to have been altered from time to time. In Sein kyi v. Ma E (12), the marriage between such parties was required to be celebrated in accordance with the customs of both the Burmese and Chinese. In Ma Thein Shin v. Ah Shein (13), however, the adoption of Chinese ceremonies at

(11) (1932) 10 Ran.97. at 104.
(12) (1916) 8 L.B.R. 399.
(13) (1915) 8 L.B.R. 222.

the marriage was considered not indispensable, and in Saw Maung Gyi v. Ma Thu kha(14), such ceremonies were held to be unnecessary, the consent of the parents of the Burmese girl and mutual consent of the parties to become husband and wife being the only requisites of a valid marriage. This, of course, was the view in Lower Burma. In Upper Burma, however, it was held in Wa Foom v. Ma Thein Tin(15) that the consent of the parents of the parties to the marriage must be obtained, and that the respective positions of the parties must be such that a marriage between them will not be invalid. Hence, according to Upper Burma view, no marriage between a Burmese Buddhist woman and a Buddhist Chinaman was considered legally binding unless the aforesaid requisites were fulfilled.

In Ma Yin Mya v. Tan Yauk Pu(16) on the question whether the Burmese Buddhist Law of marriage should be applied to Chinese Buddhists a Full Bench of the Rangoon High Court held that, while the capacity of each of the parties to the marriage is governed by his or her law of domicile, the formal requisites of the marriage are to be determined as follows:-

(1) Burmese Buddhist Law regarding marriage is prima facie applicable to Chinese Buddhist as lex loci contractus.

(2) to escape from the application of Burmese Buddhist Law regarding marriage, a Chinese Buddhist must prove that he is

(14) (1915) 8 L.B.R. 208.
(15) (1914) 7 B.L.T. 71.
(16) (1927) 5 Ran.406 (F.B.).

subject to custom having the force of law in Burma, and that the custom is opposed to the provision of Burmese Buddhist Law applicable to that case; and

(3) in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese woman, he must show that the application of the customs having the force of law will not work injustice to the woman.

Several Learned Judges of the High Court of Judicature, however, in later cases have, without impugning the conclusion that a Chinese Buddhist man cannot claim as against a Burmese Buddhist woman that in matters of marriage, the Chinese customary Law should form the rule of decision, found themselves unable to subscribe to the reasons given in Ma Yin Mya's case and in particular to the view held there that Burmese Buddhist Law applies to all Buddhists of whatever nationality in the province (17).

In Chan Pyu v. Saw Sin (18), Cunliff J. considered the effect of the decision aforesaid. He appeared to have thought that the case could have been decided on the analogy of the decisions of the English Courts preventing, on equitable principles, in cases of the formal requisites of marriage, hardship or injustice being experienced by English women who have ignorantly married husbands who are foreigners in a legal

---

(17) U E Maung, Burmese Buddhist Law, 4
(18) (1928) 6 Ran.623 at 639.

sense.

Heald, offg.C.J. in Phan Tiyok v. Lim Kyin Kauk (19) suggest that it might have been possible to base the validity of a marriage between a Chinese Buddhist man and a Burmese Buddhist woman on consideration of justice, equity and good conscience or on the basic conditions which are generally recognised by civilised races as necessary to constitute marriage, such as permanent cohabitation with a view to the procreation of children and with the repute of marriage, rather than on the requirements of Burmese Buddhist Law or of any other particular form of law. The Learned Chief Justice found further support to this view in the dictum of Fox C.J. in Sein Kyi v. Ma E (20), which he goes on to say, "is also a case relating to marriage, and which is interesting because the Learned Chief Justice said in it that, "prima facie there is no strong reason why the customary law of the man should be applied and the customary law of the woman utterly disregarded, at any rate, up to and at the time of the marriage." That statement seems to support my suggestion that in such cases it is "justice, equity and good conscience" which should be applied, rather than either Burmese Buddhist Law or Chinese Customary Law. (21)."

Otter, J. took the view that section 13 (1) of the Burma

---

(19) (1930) 8 Ran.57 (F.B.).
(20) (1916) 8 L.B.R. 399.
(21) (1930) 8 Ran.57 at p.98 (F.B.).

Laws Act contemplates in the case of Buddhists the personal Law of the particular Buddhist party and not necessarily the Burmese Customary Law (22).

Brown, J. who was one of the members of the Full Bench which decided Ma Yin Mya's case, found himself later unable to support in all its implications the dictum of Rutledge, C.J.: "It is true that the Burmese Buddhist Law is the only Buddhist Law of which we have any real knowledge. I do not think, however, that it necessarily follows that the law must be applied in matters of succession to all Buddhists of whatever nationality they may be and whatever customs they may follow."(23)

Maung Ba, J. who also was a member of the Full Bench, which decided Ma Yin Mya's case found himself in Phan Tiyok v. Lim Kyin Kauk unable to pursue to its corollary the dictum of Rutledge C.J., therein, and states, "Although the ordinary Chinese Buddhist is a Buddhist within the meaning of Section 13 of Burma Laws Act, there is no law which can be called 'Buddhist Law' recognised by the Chinese in Burma, apart from the general customary law applicable to both Buddhist and non-Buddhist Chinamen. They do not recognise the Dhammathats which are recognised by the Burmese Buddhist and which have come to be known as the Burmese Buddhist Law." (24)

---

(22) (1930) 8 Ran.57 at p.135
(23) (1930) 8 Ran.57 at page 139
(24) (1930) 8 Ran.57 at page 136.

Page C.J., whilst declining to consider whether the actual decision in Ma Yin Mya's case was correct or not, expressed his inability to subscribe to the view of Rutledge, C.J., in Ma Yin Mya's case that, 'the only Buddhist Law, however, in my opinion, of which the Courts in this province have ever taken cognizance is Burmese Buddhist Law' and later goes on to say that, 'As I apprehend the meaning and effect of section 13 of the Burma Laws Act, however, the Burmese Customary Law is to be applied in Burma to Burmese Buddhists and the Chinese Customary Law to Chinese Buddhists, not because these Customary Laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burman and the Chinese in Burma who profess the Buddhist religion respectively are governed,"(25) a view which Cunliffe, J. reaffirming his judgement in Chan Pyu v. Saw Sin (26) accepts.

Ba U.J., in Ma Kyin Hlaing v. Mg.Kyin Swi (27) observes, "the question of marriage and succession are so intimately bound up that one follows the other as the night and the day and so one part of one's life should not be allowed to be governed by one law and another part by another law."

However, the Privy Council decision in Tan Ma Shwe Zin's case (28) has now settled the point for ever. It was pointed out in Daw Thike (a) Wong Ma Thike v. Cyoung Ah Lin (29) that

(25) Tan Ma Shwe Zin v. Tan Ma Ngwe Shwe Zin,(1932)10 Ran.97 at p.104.
(26) (1928) 6 Ran. 623.
(27) (1937) Ran.90.
(28) (1939) Ran.548 (P.C.).
(29) (1951) B.L.R.133 (S.C.).

there is only one Buddhist Law that is known to the Courts and the people of the country, and the law that is known to them, as explained by this Court in the case of Dr.Tha Mya v. Daw Khin Pu (30) is contained in the Dhammathats and the collection of precedents. Therefore, prima facie a Buddhist in Burma, irrespective of whence he came, is governed by the Dhammathats and the precedents in the matter of marriage, inheritance and succession unless he can prove that he is governed by a custom which has the force of law and which is opposed to the Burmese Buddhist Law. A Chinese Buddhist is prima facie governed by the Burmese Buddhist Law.

2. The Law applicable to mixed marriages.

(a) Choice of laws.

It is clear that there are no separate provisions in the Dhammathats to deal with questions of conflict of laws. "Under the Burmese regime, all persons, whatsoever their race or creed, were governed by the Dhammathats, and since by Private International Law marriage is decided by law of the place where it is celebrated, it follows that legal marriages according to Burman Buddhists custom could have been contracted in Burma, before annexation, between Buddhists and adherents of other religions; and if the marriage was valid when contracted, it cannot have become invalid by any subsequent change of law, unless there had been a statutory provision invalidating such

(30) (1951) B.L.R.108 (S.C.).

marriage (31)."

In Ma Chein v. Ma Mo (32) a Burman Roman Catholic lived with a Buddhist woman as man and wife, long before the British annexation of Upper Burma. Both parties were the subjects of the Burmese King. Thirkell White, J.C., held that Buddhist Law of marriage applied to them as the lex loci contractus; that there was a presumption in favour of the fact of a marriage having been contracted between persons who had lived together and professed to be man and wife for a number of years, and the burden of proving the invalidity of a marriage in the circumstances is on the party who impeached or questioned its validity. The learned Judicial Commissioner in arriving at the decisions, relied upon Stories Commentaries on the Conflict of Laws (33) in which occurred the following passage:

"The general principle certainly is, as we have already seen, that between persons sui jurio marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere."

It may then be said that Burmese Buddhist Law is applicable to marriages between Buddhist women and non-Buddhist men as the lex loci contractus, if they were contracted before the

(31) U May Oung, Leading Cases on Buddhist Law, 10.
(32) Chan Toon's Leading case 11, p.224.
(33) Eighth Edition, 187.

annexation of Burma. But in Sophia Blin v. Maria David (34), it was held by the Chief Court of Lower Burma that Burmese Buddhist Law did not apply to marriages of non-Burmans celebrated in Burma during the Burmese regime. It is therefore necessary to state the law applicable to marriages between Burmese Buddhists and persons of other faiths, and the changes in the rules applicable in such situations.

(b) Marriage with Mahomedans.

It is now settled law that Mahomedans can contract valid marriages with kitabis. By kitabis are meant those persons "who believe in a heavenly or revealed religion, and have a kitab or book that has come down to them, such as the Book of Abraham or Seth, and the Psalms of David (35)".

It is also said that "it is unlawful for a kitabi to marry a pagan woman or an idolatress before she becomes a Mussalman (36)." In Queen Empress v. Nga Pale (37) it was held that a Buddhist cannot be said to have a heavenly or revealed religion and a kitab or book of recognised authority which would place them on the same footing as Jews and Christians and other religionists believing in one God. Consequently, no legal marriage can be contracted between a Mahomedan and a Buddhist woman unless the latter professes Mahomedanism and the ceremony

(34) (1918) 12 B.L.T.48.
(35) Tagore's Lecture (1873) 305.
(36) Ibid 304.
(37) (1899) P.J.607.

is performed in accordance with the Mahomedan rites. The converse holds good. In Ma Le v. Maung Kye and another (38), this problem was considered, and Thirkell White, J.C., observed:

"The prohibition of marriage between a Mahomedan woman and a man of different religion appears to be even stronger than that of a marriage between a Muslim and a non-Moslem female. For, the prohibition is absolute, and extends even to unions with Christians and Jews."

The leading case on the subject of mixed alliances between the Buddhists and the Mahomedans is that of Abdul Razak v. Aga Mahamed (39) wherein their Lordships of the Privy Council appear to have considered it as settled law that a Mahomedan cannot lawfully marry a Buddhist woman unless the woman embraces Islam. In all cases where according to Mahomedan Law unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability (40). Sincerity of the conversion or sincerity of religious belief is immaterial so long as Mahomedan faith is professed. The essential doctrine of the Mahomedan faith consists in the belief in one God and the belief that Mahomad is His prophet (41). It may be noted here

(38) (1899) II U.B.R.(1897-1901) 497.
(39) (1893) 21 Cal.666 (P.C.).
(40) Ibid.
(41) Narantakath v. Paraklal, (1922) 45 Mad.986.

that if the Burman Buddhist apostatises from the Mahomedan faith the marriage tie is immediately dissolved without a talak or decree of Court (42). Formal renunciation of the faith in Mahomedanism is all that is required for apostacy. It is immaterial whether the motive of the renouncer is genuine change of faith or a mere device to have the marriage dissolved.(43). Uttering of words against Mahomedan faith or any oral act of faith in any religion other than Mahomedanism constitutes apostacy (44). Hence, U Chan Toon said, 'It does certainly appear anomalous that a party to a contract should, at will, be able to throw off an obligation by a declaration of a change in belief (45)."

(c) Marriage with Hindus.

Except under the provisions of the Special Marriage (Amendment) Act (XXX of 1923), there cannot be a valid marriage between a Hindu of any caste and a Buddhist (46). Before the said Act came into force, it was held in Badein Singh v. Ma May (47) that a Hindu could only marry a Hindu woman of his own caste, and that so long as he remained a Hindu, he could not marry a Buddhist girl. But in S.Anamalai Pillay v. Po Lan (48), it

(42) Ma Saing v. Kadir Moiddin,(1902)8 B.L.R.16; Sona Ullah v. Ma Kin,(1918)9 L.B.R.206.
(43) Mt.Rahmate v. Nikka,(1928) A.I.R. Lah.954.
(44) Hussein Unwar v. Fatima Bee, (1884)S.J.368.
(45) Principles of Buddhist Law, 38.
(46) see under Present position of the Law (infra)
(47) (1900) 6 B.L.R.253.
(48) (1905) 3 L.B.R.228.

was decided that a Hindu of the Punchama or Pariah class can, in the absence of proof to the contrary, contract a valid marriage with a Buddhist.

(d) Marriage with Christians.

Section 4 of the Christian Marriage Act (XV of 1872) declares that every marriage between persons one or both of whom is or are a Christian or Christians shall be solemnized in accordance with section 5, otherwise it would be invalid. Previous to 1927, where the marriage had taken place under the Christian Marriage Act no divorce suit could be maintained at the instance of the Buddhist spouse, as section 2 of the Divorce Act, (IV of 1869) (49) as it then stood, did not authorise any Court to grant any relief under the Act except in cases where the petitioner professed the Christian religion and resided in India at the time of presenting the petitions.

That was the decision in Kin Twe U v. C.Ripley (50) wherein Burgess, J.C., observed:

"It is apparently an anomaly that one of the parties to a marriage - in this instance, the husband - should be entitled to relief under the Divorce Act, because he professes the Christian religion, and that the other - in this instance the wife - should

(49) Section 2 declares "Nothing hereinafter contained shall authorize any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition."

(50) (1895) II U.B.R. (1892-6) 338; see also Chan Toon's Leading Case, 32.

be debarred from such relief, because she does not profess that religion, although she was allowed to marry under the Christian Marriage Act, notwithstanding such difference in religion, and it has not unnaturally been argued that such a state of the law could never have been contemplated by the legislature."

Fortunately, however, this absurdity was removed by section 2 of the Divorce (Second Amendment) Act (XXX of 1927); it is now possible to obtain a divorce under the Act where either the petitioner or the respondent professes the Christian religion.

In Maung Kyaik v. Ma Gyi (51) a Burmese Buddhist became a convert to Christianity and contracted a valid marriage with a Christian. He then reverted to Buddhism and contracted a second marriage with a Buddhist woman. It was held that the second marriage was invalid, as apostacy did not ipso-facto dissolve a Christian marriage. In Lily Rose Cheng Gwan v. Cheng Gwan (52), both parties were Christians at the time of the marriage. The husband, subsequently, abandoned the Christian faith and the wife sued for divorce under the Divorce Act, 1869. The suit was decreed. In Ma E Tha v. Ma Thein Kin (53), the couple were married according to Burmese Buddhist rites. The husband subsequently, embraced Christianity, but the Rangoon High Court held that the Buddhist marriage was not automatically dissolved by apostacy of either spouse, as in the

---

(51) (1890) II U.B.R. (1897-1901) 488.
(52) (1897) 5 B.L.R. 1.
(53) A.I.R. (1935) Ran.37 at 39.

case of Mahomedans.

(e) Marriage with Chinese.

Much of what can be said about marriage between Burmese Buddhists and Chinese has already been set out in the section entitled "conflict with foreign customary law." In Ma Kyin Mya v. Maung Sit Han (54) the question was whether a marriage subsisted between a Chinese Confucian and a Burmese Buddhist woman. Sparge J., remarked:-

"In cases of a marriage in Burma between a Chinese confucian and a Burmese Buddhist woman, section 13(1) (a) of the Burma Laws Act does not apply as both parties are not Buddhists, and section 2 of the Special Marriage Act 1872 also does not apply as one party is a Confucian and the other a Buddhist. Section 13(3) of the Burma Laws Act therefore, becomes applicable as a matter of equity, justice and good conscience, and in a case of this nature, it means not the application of English Law, but of Burmese Customary Law as the lex loci contractus."

In Ma Tin v. Ko Sein Hone (55) it was held that in absence of any sufficient authority either judicial or legislative to show that either the Chinese Customary Law or the Burmese Buddhist Law should govern the question as to the respective interests of the Chinese Buddhist husband and the Burmese

---

(54) (1937) Ran.103.
(55) A.I.R. (1939) Ran.291.

Buddhist wife in the property held by either or both, the question as to the division of property between the parties upon divorce should be decided according to justice, equity and good conscience under section 13(3) of Burma Laws Act. In Tan Ma Shwe Zin v. Koo Soo Chong (56) it was held that a Chinese Buddhist is a 'Buddhist' within the meaning of section 13 of the Burma Laws Act (XIII of 1893) and consequently, the marriage of a Burmese Buddhist woman with a Chinese Buddhist man is now governed by Burmese Buddhist Law. In Daw Thike (a) Wong Ma Thike v. Cyoung Ah Lin (57), it was held that if a Chinese Buddhist is prima facie governed by the Burmese Buddhist Law there is all the more reason why a Sino-Burmese Buddhist should be governed by the Burmese Buddhist Law. His ways, manners and modes of life are the same as the Burmese and he is a citizen of the Union of Burma by birth. Therefore, unless and until he can prove that he is subject to a custom which has the force of law in Burma and that custom is opposed to the provisions of Burmese Buddhist Law, he is governed by Burmese Buddhist Law.

3. Present Position of the Law.

From what has been said above, it will be seen that the conflict of personal laws put the Burmese Buddhist woman in an unenviable position in regard to matters of marriage. Her marriage to a Christian was valid only if solemnised by a minister of religion legally competent to perform the ceremony

(56) (1939) Rang. (P.C.) 548.
(57) (1951) B.L.R.133 (S.C.).

or by a Registrar of Marriages (58). A valid marriage with a Muslim was only possible if she had previously professed conversion to Islam (59), and if she survived him, she was usually dismayed to discover what her rights of inheritance were (60). Marriage with a Hindu other than a panchama was impossible (61). Nevertheless, unions between Burmese Buddhist women, and foreigners became common, and though, in many cases, the woman entered into the association under no delusions as to her status, there were others in which she regarded herself as validly married. In any case, when the man died or broke off the association she found herself without rights against him or his estate. Legislation to remedy this intolerable state of affairs was inevitable.

As seen above, there was no possibility of a valid union between a Buddhist and a person following the Hindu, Sikh or Jain faith. The Special Marriage Act (No.3 of 1872) provided for inter marriage between two persons neither of whom followed the Christian, Hindu, Mahomedan, Jewish, Pasi, Buddhist, Sikh, or Jain faith. But the Special Marriage (Amendment) Act No.30 of 1923 made possible valid union between persons one of whom followed the Buddhist faith and the other either the Hindu or the Sikh or the Jain faith. One of the parties to such a marriage must give notice in writing to the Registrar of

(58) Christian Marriage Act 1872, section 5.
(59) Q.E. v. Nga Pale, (1899) P.J.L.B.607.
(60) A. Gledhill, Burmese Law in the Nineteenth Century, with special reference to the position of women, 31.
(61) S. Anamalay Pillay v. Po Lan, (1905)3 L.B.R.228.

Marriages of his district under Act 3 of 1872 and after the expiration of fourteen days the marriage may be solemnised in the office of the Registrar or at a place within reasonable distance of the office (62). Any marriage thus contracted may be dissolved under the provisions of the Indian Divorce Act (No.4 of 1869) (63). But when a Burman Buddhist marries either a Hindu or a Sikh or a Jain under the provisions of the Special Marriage Act as amended by Act 30 of 1923 he or she is debarred from adopting a child (64) and on their death, succession to their estate is governed by the provisions of the Indian Succession Act (65).

In 1939 the Legislature intervened and enacted a Statute called the Burmese Women's Special Marriage and Succession Act, 1939 (XXIV of 1939). Under the provisions of this Act, a Buddhist woman can contract a valid marriage with any non-Buddhist, without abandoning the Buddhist faith, and succession to the estate of a couple marrying thereunder, will be regulated by Burmese Buddhist Law (66). It directly interferes with the personal laws of non-Buddhists. It legalises a union between a Buddhist woman and a Mahomedan, although under the Koranic Laws, he cannot contract a valid marriage with a non-kitabi. It was fear of

(62) Special Marriage Act. (No.3 of 1872), section 4.
(63) Ibid, section 17.
(64) Special Marriage (Amendment) Act No.30 of 1923, section 25.
(65) Ibid, section 24.
(66) section 26 of Special Marriage and Succession Act, 1929.

offending the religious feelings of Indian Muslims which deterred the Indian Legislature from making provision for the marriage of a Mahomedan with a Buddhist woman under the Special Marriage Act, 1872 and the (Amendment) Act, 1923.

After the attainment of Burma's independence in 1948, a new Burmese Woman's Special Marriage and Succession Act was passed by the Burmese Parliament in 1954 (67) repealing and replacing the old Act. The Act is applicable to every Buddhist woman and her non-Buddhist husband whatever his personal law (68). Under this Act a Buddhist woman, who is a citizen of the Union of Burma and a non-Buddhist man can contract a valid marriage, without in any way affecting the position of the woman by giving a written notice in the prescribed form to the Registrar of Marriages of the village or town where either of them has resided for fourteen days before the service of such notice and by signing a declaration in the prescribed form in the presence of two attesting witnesses and the Registrar (69). After the lapse of fourteen days of the service of notice, provided all the conditions mentioned in Section 5 of the Act have been complied with (70), the marriage

(67) Buddhist Women's Special Marriage and Succession Act,1954. (Act 32 of 1954) in Burmese.
(68) Section 4 of Act 320 of 1954.
(69) Section 7.
(70) Section 5 of the Act provides:- "A non-Buddhist man who has attained the age of puberty and a Buddhist woman not below the age of 14 may contract a valid marriage provided:
(a) the parties are of sound mind.
(b) in the case of a woman under the age of 20, the express consent of the father or mother, or, if they be dead, of the guardian de facto or of the guardian de jure, if any, has been obtained.
(c) in the case of a woman, there is no valid subsisting marriage.
(Translation from Burmese)

may be solemnized by the party who has given notice to the Registrar declaring that he or she is taking the other as his or her spouse in the presence of two attesting witnesses and the Registrar (71). A marriage thus contracted may be dissolved under the provisions of the Burmese Buddhist Law (72). Any child born of the couple before the solemnization of the marriage thus contracted shall be deemed to be legitimate (73). The Burmese Buddhist Law of Succession and Inheritance is to be applied to properties of the parties who marry under this Act. All questions relating to the ownership of properties of the parties to the marriage contracted under the Act shall be decided according to the provisions of the Burmese Buddhist Law as though the parties were Burmese Buddhists (74). This is tantamount to saying that the personal law of the wife as lex loci contractus is to be applied.

It may be noted that the Act does not cover Chinese Buddhists since it is applicable only to non-Buddhist husbands of Burmese wives. It is, of course, settled that a Chinese Buddhist domiciled in Burma is governed by the Burmese Buddhist Law in matters of marriage and succession. But can he dispose of his property by will - a custom which is offensive to the Burmese Buddhist Law? The decision of the High Court in Yup Soon E's case (75) seems to suggest an affirmative answer. In this case

(71) Sections 10, 11 and 15.
(72) Section 25.
(73) Section 27.
(74) Section 25.
(75) Yup Soon E v. Saw Boon Kyaung, (1941) R.L.R.285.

it was held that although a will was not recognized under Buddhist Law, the custom or usage varying this strict rule in the case of a Chinese Buddhist had received recognition by the highest judicial authority in Burma and therefore a Chinese Buddhist could make a will (76). If this is so, then there seems to be a gap in the law, for, under the Buddhist Women's Special Marriage and Succession Act of 1954 the estate of non-Buddhist husbands of Buddhist women would be governed by and disposed of according to the Burmese Buddhist Law of Succession and Inheritance. In this respect Section 26 is imperative and admits of no exception (77).

The Supreme Court in the case of Daw Thike (a) Wong Ma Thike v. Cyoung Ah Lin (78) has applied the rule of Koo Soo Chong to the case of a Sino-Burmese Buddhist and held that prima-facie a Buddhist in Burma, irrespective of what his nationality is and irrespective of whence he came is governed by the Burmese Buddhist Law in the matter of marriage, inheritance and succession. To this extent the law is clear. However, there is the very important exception that if a Chinese Buddhist could prove that he is governed by a custom which has the force of law in Burma and which is opposed to the Burmese Buddhist Law, he may be exempted from the application of the latter. But the custom alleged must be 'ancient', certain and reasonable. So and,

(76) Yup Soon E v. Saw Boon Kyaung, (1941) R.L.R.285
(77) U Hla Aung, The Sino-Burmese Marriages and Conflict of Laws, The Burma Law Institute Journal, (1958) Vol.1, 25 at 53.
(78) (1951) B.L.R.133.

in practice, it has been found very difficult in Burma, to establish customs repugnant to the personal law. (79)

It is significant to note that nowhere in the opinion did the Chief Justice refer to Yup Soon E's case (80). It may well be that that case is still the law today despite Koo Soo Chang's case (81). However, his lordship has made three important points in which could have profound influence upon later decisions (82). In the first place, he declared that Chinese Customary Law is foreign law (a proposition which seems self-evident, but which, nevertheless, had been overlooked by the Courts in Burma for more than half a century) and, therefore that it should be proved according to section 38 and 45 of the Evidence Act (83).

In the second place, he declared that the Court could take judicial notice of the change of Government in China; that under the new Government almost all the old laws had been replaced by new ones: that the Chinese customary law was no longer in force in China, and therefore, it could not be enforced in

---

(79) (1951) B.L.R.133.
(80) (1941) Ran.L.R.287.
(81) Ma Shwe Zin v. Koo Soo Chong, (1939) Ran.L.R.548(P.C.)
(82) see, for example, Chan Eu Ghee v. Mrs.Iris Maung Sein (a) Lim Gaik Po, (1953) B.L.R.294.
(83) Section 38 of the Evidence Act says: "When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant." Section 45 of the Evidence provides: "When the Court has to form an opinion upon a point of foreign law.... the opinion upon that point of persons specially stated in such foreign law... are relevant facts. Such persons are called experts". Section 7 Burma Code (1943) 404-5.

Burma. He said that the Legislature, in enacting section 13 of the Burma Laws Act could never have intended that the Court should go roving about all over the world in search of law that would be applicable to parties in proceedings before them.

Finally, the Chief Justice quoted with approval a statement which appeared in the opinion of Sir Guy Rutledge in Ma Yin Mya v. Tan Yauk Pu (84) to the effect that a foreign Buddhist could not bring his personal law into this country and even if he could, it should not be allowed to prevail to the detriment of the people of this country if it was in conflict with the law of the land.

In view of the aforesaid remarks made by the Supreme Court one may draw the conclusion that a Chinese Buddhist may not dispose of his property by will if such disposal would be detrimental to the interests of his Burmese Buddhist heir or heirs. However, there is no definite ruling on this specific point.

---

(84) (1927), 5 Ran. 406 at 419 (F.B.).

CHAPTER VI

BURMESE BUDDHIST MARRIAGE

1. Nature of Buddhist Marriage.

Satyanarayana Rao, J., observed:- (1)

"Marriage as an institution was recognised by all civilised nations from very early times. Its utility to bring about a settled life in an organised society cannot be gainsaid. Some consider marriage as a purely civil contract, while others treated it as a religious institution. In Lindo v. Ballisaro (2), Sir William Scot, J., summarised the legal conception of marriage as he understood it in these words; 'The opinions which have divided the world or writers at least, on this subject, are generally, two. It is held by some persons that marriage is a contract merely civil, by others, that it is a sacred, religious, and spiritual contract, and only to be so considered. The jurisdiction of the Ecclesiastical Court was found on ideas of the last described nature; but in a more correct view of the subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or a religious

---

(1) Deivanai Achi v. Chidambaram Chettiar, A.I.R. (1954) Mad. 657 at 662.

(2) (1795) 1 Hag. Con. 216 at 30. Qutoed in Deivonai Achi v. Chidambaram Chettiar, A.I.R. (1954) Mad. 657 at 662.

contract, and, at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes wherever two persons of different sexes engage, by mutual contracts, to live together ..... It cannot be a mere casual and temporary commerce, but must be contract at least extending to such purposes of a more permanent nature, in the intention of the parties. The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries .... In most countries it is also clothed with religious rites, even in rude societies, as well as in those which are more distinguished for their civil and religious institutions.' The Hindu conception of a marriage is that it is a '<u>Samskara</u>', a purificatory ceremony prescribed by religion. The English word 'sacrament', which is very often used as interchangeable with '<u>Samskara</u>', may not accurately bring out the importance of the sanskrit word. The word 'sacrament' had had a varied history and is full of associations likely to mislead. The Sanskrit word simply means a purificatory ceremony prescribed by religion."

Before going further into the matter it is necessary to consider Burmese notions as to nature and origin of marriage. The legendary account of the beginning of the human race states how the first men and women came together (3):-

"Then the males looked on the females, the females on the males, and thus sexual desire inflamed all, and sexual intercourse took place universally. Wise men reviled and opposed these degrading practices. To be free from this, and to conceal their bad deeds, they built houses, lived within enclosures, and following each others example, secured a supply of food".

Commenting upon this passage, U May Oung in his Leading Cases on Buddhist Law, (4) observed:-

"The probable origin of the Burmese expression ein-taung or ein-daung (literally to set up a house) is here revealed, and in the olden days a marriage was actually a setting up of a house. The people lived in collections of small dewelling places, and when a new couple arose, a new place of residence where they would 'live and eat together' was put up for their use, either immediately or as soon as practicable afterwards. Thus, the fact of their union could not but become known to all in the village. Those in authority would note a new unit for taxation, and the companions of the bride and bridegroom

(3) Manugye. Bk. I. sec. 6.
(4) Leading Cases on Buddhist Law, 3.

would realise a defection from their company. The house and its appurtenances, nearly all presents from parents, relatives and friends, would constitute the nucleus of the new pair's joint property, and every inducement would exist for a satisfactory continuance of the household."

There was a time in Burma when r~~eluctance~~ participation of a priest was essential to the solemnisation of marriage, particularly in Upper Burma before King Anawratha introduced Buddhism in its present form into the Kingdom of Pagan in about the eleventh century. The Glass Palace chronicle of the Kings of Burma (5) says:-

"In the reign of Anawrathaminsaw, the kingdom was known as Pugarama. Now the kings in that country, for many generations, had been confirmed in false opinions following the doctrines of the thirty Ari lords and their sixty thousand disciples who practised piety in Thanahti. It was the fashion of the Ari monks to reject the law preached by the Lord, and to form each severally their own opinions ..... Moreover, Kings and ministers, great and small, rich men and common people, whenever they celebrated the marriage of their children, were constrained to send them to these teachers at nightfall, sending as it was called, the flower of their virginity.

---

(5) Part IV, p. 71. Translation by Tin & Luce.

Nor could they be married till they are set free early in the morning. If they were married without sending to the teacher the flower of their virginity, it is said that they were heavily punished by the King for breaking the custom. ..... But Anawrathaminsaw was a king of ripe perfections. He was converted by Shin Arahan and he rejected the doctrine of Ari heretics."

U Chan Toon said, (6), "But the circumstances of the people have changed widely both through the conquests of Alompra and the subsequent annexations of the country by the British, the liberalizing effect upon the minds of the people being apparent to an ordinary observer."

Sir John Jardine observed (7), "We can not apply the principle or the practice of the Dhammathat to the changed society without modifications; and in the moulding of the law it is of great public importance that the Judges should modify the old rules in the line of present custom and opinions rather than that of a bye-gone day."

Hodgkinson, J.C., said, "Care must be taken in applying to cases at the present day principles derived from an archaic society and now materially affected in their application by the existing order of things (8)."

---

(6) The Principles of Buddhist Law, 23.
(7) Jardine's Notes, Part I, sec. 22.
(8) Ma Gywe v. Ma Thi Da, (1891) II U.B.R. (1892-6) 194.

The term 'Buddhist' in reference to the customary laws of the Burmans is a misnomer, but its use in connection with matrimonial law is not only misleading, but even incongruous (9). Although, as Dr. Farchhammar said (10), "there is no justification in looking upon Burmese marriage in any other light than that of Buddhist ethics," the very idea of wedlock and its attendant wordly life is opposed to the ultimate end of Buddhism - the annhilation of desire; and notwithstanding that the Buddha, in his discourses to the laity, laid down rules of conduct to be observed by married persons, parents and children, yet he was careful to impress upon his hearers the need for keeping in mind the spiritual life. This, while commending him who supports his father, mother, wife and offspring, he at the same time indicates the goal of Nirvana, the striving for which must necessarily involve celibacy (11)."

Marriage amongst Burmese Buddhists has lost entirely any religious character it might have had and at the present day it is purely a civil and consensual contract. Buddhist monks keep entirely aloof from such wordly ceremonies. In its juridical aspect marriage is contractual, but it creates a

---

(9) U May Oung, Leading Cases on Buddhist Law, 2.
(10) Introductory remarks to Jardine's IIIrd Note.
(11) Mangala-sutta verses 5 and 10.

status, the incidents of which are quite independent of the volition of the parties (12). Marriage not only determines questions of legitimacy and inheritance but it imposes a liability on the husband to maintain his wife and children and to remain faithful to wife. Amongst Burman Buddhists there is an additional incident that flows from marriage, namely the joint interests enjoyed by both husband and wife in the property ~~of~~ acquired after marriage (13). Burmese Buddhist marriage resembles Mahomedan marriage in being contractual, but it differs from Hindu marriage which is a sacrament (14).

2. FORMALITIES OF MARRIAGE

In the Dhammathats it is stated that there are two forms of marriage, the avaha, in which the bride is brought to the bridegroom's house at an auspicious moment and the marriage is solemnized there; and the vivaha, in which the bridegroom goes to the bride's house and marries her there (15). This points to some measure of formality, and in most Burmese marriages there is some ceremonial practice, such as an announcement of gifts, the joining of hands, and other ritual acts introduced by Hindu astrologers (16). But such formality is

---

(12) U Chan Toon, The Principles of Buddhist Law, 23.
(13) S.C. Lahiri, Burmese Buddhist Law, 24.
(14) ibid.
(15) Digest, II, sec. 34.
(16) U May Oung, Leading Cases on Buddhist Law, 4.

not indespensable, and no ceremony is required (17). Sir John Jardine said (18), "Doubtless the laws which dispense with ceremony and registration leave the door open for uncertainty, mistake and fraud; but in this respect other civilised nations have to encounter the same evils, and the only remedy is by legislation." In Ma Gywe v. Ma Thi Da (19) it was held that the consent of both parties is all that is essential to the contract of marriage, and that no ceremony is essential. In Mi Me v. Mi Shwe Ma (20) their lordships of the Privy Council held that 'no ceremony of any kind is essential, Mutual consent is all that is required. In the absence of direct proof, consent may be inferred from the conduct of the parties, or established by reputation. In Ma Hla Me v. Maung Hla Baw (21) it was held that, if a Burmese Buddhist couple go through a marriage ceremony customary to persons in their state of life, but the ceremony is not followed by cohabitation, so that the marriage is never consumated, the marriage tie does not exist between the parties. Baguley, J., said (22), "It was strongly

---

(17) Ma E v. Maung San Da, (1897) 1 L.C. 140; 3 B.L.R.S.
Mi Me v. Mi Shwe Ma, (1912) 1 U.B.R. (1910-13) III (P.C.).
(18) Jardine's Note I, 22.
(19) (1891) II U.B.R. (1892-6) 194.
(20) (1912) I U.B.R. (1910-13) III (P.C.)
(21) (1930) 8 Ran. 425.
(22) ibid.

urged for the respondent that the ceremony itself was sufficient to establish the relationship of husband and wife, but I am unable to accept the contention. The chief difficulty is that there is no recognized ceremony of marriage among Burmese Buddhists. If a ceremony alone is enough to constitute marriage, then there must be some definite point in the ceremony before which the parties are not married. No such definite point could be indicated. The ceremony itself is not a fixed one; it depends almost entirely on the finances and wishes of the parties. Also the ceremonies differ; sometimes it is merely a case of entertaining a few of the neighbours to tea and letpet (i.e. pickled tea). This may or may not be followed by the rendering of obeisance to parents and elders. Then again, there may or may not be the feeding of pongyis and the making of offerings to them. No individual item seems to be essential, or by itself sufficient to constitute a marriage. My own personal view, for which it may be worth, based on more than twenty years' experience as a judicial officer, is that a marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife. The ceremony is merely a way of publishing to all the world that the cohabitation which is intended to follow it, is with the intention of ~~making~~ creating a marriage tie between the couple. In other words, the ceremony is merely a way of showing the intent of the parties; it is evidence of that intent, and is

not a means of creating the tie in itself, in this way differing from the ceremony which actually brings into existence the marriage tie among Christians, Hindus and Mahomedans (23)." It is respectfully submitted that the learned Judge's enunciation as a principle of Burmese Buddhist Law that consumation is always an essential of a valid marriage is based on inaccurate translation of the Dhammattats and is not born out by the authorities cited by him. This point is discussed in a separate section of this chapter.

3. CONSENT TO THE MARRIAGE.

There cannot be a valid marriage amongst Burman Buddhists without the free consent of the bride and bridegroom (24); consent reluctantly given under pressure is not such free consent as is required by law (25). Consent of the parents or guardians is essential to the validity of a marriage of a minor, otherwise such marriages are not valid even if the minor consents and there be sexual intercourse (26). A minor's want of capacity to enter into a contract of marriage is supplied by the parents or guardians of the minor (27). Consent of the parents or guardians may be express or implied (28). Connivance on the part of the parents or that on the part of the father alone to sexual intercourse amounts to consent (29). In

---

(23) Ma Hla Me v. Maung Hla Baw, (1920) 8 Ran. 425.
(24) Maung Thein v. Ma Thet Hnin, (1915) 8 L.B.R. 347.
(25) Ma Twe v. Lwe Hain, (1920) 13 B.L.T. 105.
(26) Q. E. v. Nga Ne U, (1883) S.J. 202.
(27) Ma E Sein v. Maung Hla Min, (1925) 3 Ran. 455 (F.B.).
(28) Ma E Sein v. Maung Hla Min, (1925) 3 Ran. 455 (F.B.).
(29) Manugye Bk. VI, sec. 20; U Tha Gywe, Buddhist Law, Vol.I (A Treatise on

Nga Ku v. Queen Empress (30), wherein 18 years was taken as the age of majority for the purpose of criminal law, it was agreed that the prosecutrix being under twenty years of age, was still under the guardianship or control of her father in respect of marriage, and that therefore he was at liberty to give her in marriage without her consent, but it was held that even a minor cannot be forced into a marriage against her will. In Maung Taik v. Ma Cho (31), it was held that among Burmese Buddhists a woman, whether a minor or not, cannot be legally married without her consent or against her will. Thirkell White, J.C., observed (32), "I have no doubt that the doctrine which seems to me the inspire the Dhammathats that a girl cannot be compelled to marriage against her consent, is in accordance with the customs and usages of the people. Any other view would, moreover, conflict with the Penal Code which, as noted by Mr. Jardine and Mr. Burgess, does not contemplate the marriage of any woman against her will. On grounds, therefore, of authority, precedent, the opinions of Jurists and commentators and the teaching of natural justice, I am of opinion that, among Burmese Buddhists as among other civilized people, a woman, whether a minor or not, cannot be legally married without her consent or against her will."

---

(30) (1897) I U.B.R. (1897-01) 330.
(31) (1900) II U.B.R. (1897-01) 197.
(32) ibid.

And this undoubtedly is correct, as Sir John Jardine said, "It might fairly be argued that such interference with personal liberty and such degradation of the notion of marriage are inconsistent with equity on the one hand and public policy on the other (33)."

When a Burmese Buddhist couple gets married with the consent of their parents and the ceremony, according to the status and means of the parties, is gone through but they never live together for a single day and the marriage is not consumated, it could not constitute a valid marriage (34).

4. CONSUMATION OF MARRIAGE.

It is, indeed, surprising that this question was not specifically raised before any Court in Upper or Lower Burma until 1930 when Baguley, J., dealt with it in Ma Hla Me v. Maung Hla Baw (35). The facts of the case were as follows:-

The parents of the parties to the suit gave them in marriage, and a marriage ceremony befitting their status in life was performed. But immediately after the marriage ceremony and before consumation had taken place, there arose a quarrel between the parents of the couple and a separation followed. In the suit by the man for restitution of conjugal rights, the learned Judge held that there was no consumation of marriage, that a marriage ceremony is in itself not sufficient to create

---

(33) Jardine Notes Part I, sec. 23.
(34) Ma Hla May v. Maung Hla Baw, 8 Ran. 425.
(35) (1930) 8 Ran. 425. (1930)

the marriage tie and that consumation is always essential to complete the status of husband and wife between the parties. This decision was cited with approval without further discussions in Maung Tun Aung v. Ma E Kyi (36) and Ma Kyin Mya v. Maung Sit Han (37).

It is submitted that the first part of the decision in Ma Hla Me's case (38) that the ceremony in itself is not sufficient to create the status of marriage is correct. It is no more if it takes place, than evidence whereby the fact of their mutual agreement can be proved (39). It is but an outward expression of mutual consent between them to become husband and wife in praesenti, a normal requisite of every valid marriage. Hence, Sir John Jardine wrote (40): "But the banquet or the joining of hands may be some evidence of consent, although that sort of evidence may be over-ruled by proof that there was no consent or acquiescence, as for example, by showing that immediately afterwards, the girl repudiated by quitting the man." There is also a series of decisions including that of the Privy Council in Mi Me v. Mi Shwe Ma (41) that no ceremony of any kind is essential to constitute a valid marriage.

It is respectfully submitted, however, that the second part of the decision in Ma Hla Me's case (42) that consumation

---

(36) (1936) 14 Ran.215 (F.B.).
(37) (1937) Ran.103.
(38) (1930) 8 Ran. 425.
(39) Ma Kyin Mya v. Maung Sit Han (1937) Ran.103.
(40) Notes on Buddhist Law, Note I, sec.25.
(41) (1912) I U.B.R. (1910-13) 112 (P.C.)
(42) (1930) 8 Ran. 425.

is always a requisite of every Buddhist marriage appears not to be justified by the texts of the Dhammathats cited by the learned Judge, nor was it a point in issue in the circumstances of the case.

In the case under reference, it is clear that the parties were given in marriage by their parents. There are ample provisions in the Dhammathats to support the view of the learned Judge that in such a case, consumation of marriage is necessary to create the status.

Let us first refer to three kinds of marriages mentioned in the Digest (43). They are:

(1) Marriage affected by parents of both parties;

(2) Marriage contracted through a go-between; and

(3) Marriage by mutual consent,

U May Oung, commenting upon these three forms of marriage, said (44), "It is doubted whether this was intended to be a logical division, but all writers on Buddhist Law have apparently treated it as such. From a consideration of the Burmese original, it seems probable that the first method was intended to apply to persons under-age, more especially young women who could not marry without the parents' consent; and the third to persons over-age and those who although under-age, have been emancipated from parental control. The second way - marriage through the intervention of a third party - appdies to both classes."

(43) Digest, II. sec. 36.

(44) Leading Cases on Buddhist Law, 4.

It is submitted that this commentary on the provisions of section 36 goes too far. The Dhammathats made no reference to age of the parties in making this classification. There is nothing to warrant the supposition that the first kind of marriage was intended to apply to persons under-age, especially to a woman who could not marry without their parents' consent; and the third to persons over-age, divorcees and widows, irrespective of age.

Attasankhepa (45) mentions three kinds of wives, viz. (1) a wife married because given in marriage by the parents, (2) a wife obtained through a go-between, and (3) a wife married with consent. This classification of wives is substantially the same as that in the Digest (46) which makes no reference whatsoever to the age of the woman.

In U May Oung's view, it is possible for a woman to become the wife of the man to whom her parents have given her in marriage, without her consent. It may be that her wishes were not consulted by her parents before the marriage was performed. The first form of marriage mentioned in section 36 in the Digest must therefore, be distinguished from the third form which takes place by mutual consent of the parties; and because of this difference, the requisites for the validity of each form of marriage also vary. It is now settled law that a woman whether a minor or not, cannot be legally married

---

(45) sec. 336.
(46) Digest I, sec. 36.
(47)

without her consent or against her will (47). U. E Maung said (48), "In the development of the Burmese customary laws of marriage we have three distinct and successive stages. The first, where the parents could dispose of their daughters in marriage without any question by the daughters; the second, where the condition of the daughters given in marriage was ameliorated by giving them an option to repudiate the man displeasing to them; and the third and last in point of development, where marriage of a daughter to a suitor, whose love was reciprocated by her, came to receive recognition, at first tardily by way of avoiding disgrace to the parents but later overshadowing the earlier modes, almost to oblivion; in the result modern jurists come to treat of Burmese customary marriages as a consensual contract between the parties."

In Ma Hla Me's case (49) Baguley, J., relied upon certain sections of the Kinwun Mingyi's Digest (50); but a careful scrutiny of the texts relied upon by the learned Judge, it is respectfully submitted, shows that they do not justify the general enumeration as a principle of Buddhist Law that consumation of marriage is always necessary to create marriage status between the parties.

---

(47) Maung Taik v. Ma Cho, (1900) II U.B.R. (1897-1901) 197.
(48) U E Maung, Burmese Buddhist Law, 27.
(49) (1930) 8 Ran. 425.
(50) Vol. II, secs. 39, 48, 49, 50, 62, 81 and 87.

Section 39 of the Kinwun Mingyi's Digest, Volume II is an extract from the Kyetyo Dhammathat. The Pitakat Thamaing in which all the important Dhammathats were mentioned, made no reference to it, and according to the Kinwun Mingyi (51) the name of its author and the date of its compilation were not to be found in the work itself; it is probably of doubtful authority. The extract deal with seven kinds of Marriage (52) which are as follows:-

(1) The marriage of a young man and woman whose parents had arranged the union while they were still in their mothers' wombs, or while they were still in their infancy; (2) the marriage of a young man and woman when they themselves and their parents desire the union; (3) the marriage of a young man and woman when the parents of both and the young man desire the union, but the young woman elopes with a man of her choice just before the consumation of the marriage; (4) the marriage of young man and woman when the young man gives bridal presents as well as helps his prospective parents-in-law in business; (5) the marriage of a Brahman with the daughter of a wealthy man or of a commoner; (6) the marriage of a young woman with a young man of good birth and exalted position, her parents not accepting any presents because they esteem him; (7) the marriage of a young woman with a man other than the suitor who had been helping her parents with the intention of claiming her hand in marriage because her parents think

(51) Digest, II, sec. 4.
(52) See Digest II, sec. 39.

that no good would accrue from a marriage with him.

The contracting parties according to the second kind of marriage acquire, after the consumation of the marriage, the full status of husband and wife.

The last relevant portion of Burmese texts reads as follows:- (53)

ထိုဇနိ ဆိုခဲ့ပြီးသောအခါ၊ - ခုနှစ်ပါးတို့တွင် ပြဋ္ဌာန်းထို-
နှစ်ယောက်လည်း၊ အလိုတူ ကြိမ်၊ အခါအားလျော်စွာ ပြဋ္ဌာန်း
လည်း အလိုတူ ကြိမ်အဲ့ အိပ်ကာဝင်ကြလျှင်လင်
မယားဖြစ်ကြကုန်၏"

The official translation is as follows:-

"The contracting parties according to the <u>second kind</u> of marriage acquire, after the consumation of the marriage, the full status of husband and wife.

The official translation of the said portion is obviously inaccurate and not literal. It is purely a surmise that it refers only to the second kind of marriage mentioned in the text.

The translation should read thus:-

"Of these seven kinds of marriages, if the parties agree, (or) their parents agree and they consumate the marriage, let them become husband and wife."

---

(53) See in U E Maung, <u>Burmese Buddhist Law</u>, 25.

The passage cited above speaks of three elements, viz:

(1) consent of the parties,

(2) consent of the parents; and

(3) consumation of marriage.

According to the official translation of the text, only the combination of the first two elements (found incidentally, only in the second kind of marriage mentioned in section 39 of the Digest, Volume II) followed by the third element, i.e. consumation, constitutes a valid marriage. But that is not the law. It is respectfully submitted that the first element, i.e., consent of the parties, suggests a reference to the third kind of marriage mentioned in section 36 of the Digest, Volume II, i.e., marriage by mutual consent, and for this kind of marriage, consumation appears to be unnecessary. The second and third elements should be read jointly, because the word "ඇ" which is equivalent to "and" was advisedly used there as a conjunctive. Those two elements combined constitute the first kind of marriage mentioned in section 36 of the Digest, Volume II, i.e. marriage affected by the parents of both parties; and only in this kind of marriage, it is submitted, is consumation essential to create the status of husband and wife. If the said three elements were conjunctively construed, it would necessarily mean that there can be no marriage unless all those elements are present. But that is not the law of the Dhammathats which does not insist upon the

presence of the second element where the woman is free from parental control. The use of the words "ကဲ့သို့" after expressing the first element in the relevant passage cited above is to prevent joint reading of the first with the other two elements that follow. If this view is accepted, it will bring the text in tune with the other texts cited in the Dhammathats.

Section 48 of the Kinwan Mingyis Digest, Volume II, reads as follows:-

"If a daughter is given in marriage to a man who is dependent on her family, she becomes his wife, provided that the marriage has been consumated."

Section 49 of the Kinwan Mingyis Digest, Volume II, is also in the following terms:-

"If a daughter is given to a man who cures her of a disease from which she is suffering, he shall obtain her as wife, if he has consumated the marriage. But if the parents are unwilling to give her, and if the marriage has not yet been consumated, her kobo shall be given to him instead."

It is obvious that the texts cited in both sections, 48 and 49 of the Digest, Volume II, dealt with the case of a girl whom her parents had given in marriage to a man, presumably without reference to her desire; where marriage is affected by the parents, as in the said two cases, it is

submitted that consumation is necessary to complete the status of husband and wife.

Section 50 of the same Digest makes no reference to consumation of marriage. The texts cited there simply exhort the parents to give their daughters to men whom they are determined to marry, if they desire to avoid scandal and disgrace.

Section 62 of the Digest deals with two types of cases, firstly of men who after the betrothal but before the marriage, have sexual intercourse with women other than the betrothed, and secondly, of men who, after the marriage but before consumation, have sexual intercourse with women other than those to whom they were married. In both these cases, the texts cited therein declare that the men could not claim the women to whom they were betrothed or married as their wives, if the latter did not agree; they give the women the right to forfeit the bridal presents on the ground that they and their parents have been put to shame by the men's infidelity. Here again, all the texts deal with women given in marriage by their parents. Consequently, it is rightly laid down that there is no marriage status between the parties for lack of consumation of marriage.

Section 82 of the Kinwan Mingyi's Digest, Volume II deals with cases in which the parents accept the bridal presents and gave their daughters in marriage to the men whom the latter disliked. Here also, it is laid down that no status

of marriage exists between the parties, as there is no consumation of marriage. Baguley, J., in referring to this section said (54), "Again the section 82, we find extracts from Dhamma and Manugye to the effect that when there has been a marriage and the bride elopes with another man before consumation of marriage, the bridegroom shall get back the presents that he gave, the marriage expenses and the bride's ornaments, but if the bride elopes after consumation of the marriage, he shall be entitled to all the properties brought to the marriage by the bride, and the man who elopes with her shall also pay compensation as an adulterer; in other words, after consumation of the marriage, and not before, the bridegroom has the full rights, in this respect, of a husband." It appears that the learned Judge was per incuriam referring to section 81 and not to section 82 of the Digest, wherein no texts from the Dhamma and Manugye are traceable. It is submitted that the texts cited in sections 81 and 82 refer to cases in which the parents give their daughters in marriage, and for the reasons aforesaid, no status of marriage is created for want of consumation.

In dealing with sections 87 of the Digest, the learned Judge said that it is "probably the nearest to the point, for in this section, six Dhammathats say definitely that if a marriage has not been consumated, the relationship of husband and wife has not yet been established." It may be pointed out

(54) Ma Hla Me v. Maung Hla Baw, (1930) 8 Ran. 425.

that this section also relates to a woman given in marriage by her parents. The official translation of the texts cited herein is incomplete and misleading, in as much as it does not show as the original texts do, that they deal with cases of daughters given in marriage by their parents to men who prove unfaithful before consumation of marriage has taken place. Complementary to this section is section 68 of the Digest, Volume II, which also deals with a daughter given in marriage by her parents and who refuses to consumate the marriage. It may also be pointed out that the official translation of section 68 is also misleading and inaccurate in that it omits to indicate as the original texts do, that in the cases cited therein, the daughters were given in marriage by their parents (55). In those cases, it is laid down that no status of husband and wife is established if the marriage is not consumated.

There are two modes of becoming husband and wife among Burmese Buddhists, viz: (1) marriage effected by the parents, and (2) marriage by mutual consent.

The other mode mentioned in section 36 of the Kinwun Mingyis Digest, Volume II, viz: marriage contracted through a go-between, falls under one of the two modes mentioned above, when approval of the parties or their parents as the case may be, is sought through a match-maker, and the parties are

---

(55) U E Maung, Burmese Buddhist Law, 23.

eventually married. The consent of both contracting parties is essential in all three forms of marriage (56).

Where the marriage is of the first kind, i.e. when given by the parents without consulting the wishes of the parties, consumation of the marriage is conclusive proof of her election in favour of the marriage. Hence, the Dhammathats insist upon consumation for its validity. The parties may withhold such consent by refusing consumation; the right of repudiation is not forfeited until the marriage is consumated. Till she has elected or is conclusively presumed to have elected, she has not attained the complete status of a wife. In the second kind of marriage, i.e. when it takes place by mutual consent, consent may be expressed either orally or in writing (57) and also by consumation (58); it may also be inferred from their reputation and other form of conduct, as held in Mi Me v. Mi Shwe Ma (59). But consumation here is not an indispensible requisite as in the case of the first kind of marriage. It is submitted that all that is necessary is concensus of mind between the contracting parties in the second kind of marriage, and once it is there, the marriage is complete and the status of husband and wife is created.

U E Maung supports the view that it cannot be made the basis of a general principle that in all cases consumation is

---

(56) Mg. Taik v. Ma Cho, (1900) II U.B.R. (1897-01) 197.
(57) Tha Gywe, Buddhist Law, Vol. I, 25.
(58) Chan Toon's Leading Cases on Buddhist Law, 14.
(59) (1912) I U.B.R. III (P.C.).

necessary to complete the status of husband and wife (60).

It may be pointed out that innumerable cases came before the Courts and the Privy Council before 1930 for decision as to what constitutes a valid Burmese Buddhist marriage. If consumation of the marriage were essential, it is probable that the courts would have said so. On the other hand, their Lordships of the Privy Council laid down in Mi Me's case (61) that 'mutual consent is all that is required and in the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation." U Chan Toon, U May Oung and U Tha Gywe who have written tretises on Burmese Buddhist Law have nowhere mentioned consumation as an essential of a valid marriage. Sir John Jardine has no observation to that effect in his Notes on Buddhist Law.

It may therefore, be said that consumation of marriage, though a normal accompaniment to and incident of marriage, is not a condition precedent to the second kind of marriage, namely "marriage by mutual consent".

5. PROHIBITED DEGREES.

How far consanguinity or affinity is a bar to a valid marriage is a difficult question to answer. Major Sparks in his code of Burmese Law stated that (62), "The degrees of consanguinity and affinity within which marriage is prohibited

---

(60) Burmese Buddhist Law, 22, 24.
(61) Mi Me v. Mi Shwe Ma, (1912) I U.B.R. 111 (P.C.).
(62) Major Sparks, The Burmese Code (1860), sec. 7.

are the same as under the English canon law, except in the case of a wife's sister, and a brother's widow, Marriage with whom is permitted by Burmese Law. A man may even marry his wife's sister during the lifetime of his wife, but such marriages, as well as marriage with a brother's widow at any time, though not illegal, are opposed to public opinion and are not considered respectable. Marriage with a deceased wife's sister is considered, on the contrary, a most natural and becoming union. As in many other countries the difficulty

---

§62§ The Burmese Code by Major Sparks

In the early British periods in Burma, very few translations of the Dhammathats were available and such translations as were often inaccurate. Officials were also disposed to believe that the Dhammathats contained much that was obsolete, and that the task of the courts in finding rules governing the cases before them would be facilitated by the preparation of a brief Code. An attempt to compile such a code was made by Major Sparks. In his work which came to be known as "Spark's Code", he assumed that side by side with the written codes, there were inconsistent local customs. The purpose of Spark's Code was to combine the written law with local customs on the assumption that Dhammathats had dealt only with written law and ignored custom altogether. The code was never accepted as authoritative by the Anglo-Burmese Courts nor by the Burmese public.

of obtaining wives of suitable ranks for members of the royal family has led, both in ancient and modern times, to the custom of alliances on the part of the King and Princes of the blood with their female relatives, within degrees of consanguinity much nearer than are allowed the body of the people."

As pointed out by U may Oung (63), many kings of Burma "in their anxiety to preserve dynastic purity, were guilty of practices which would certainly not be tolerated at the present day and which, even in days gone by, were confined to the royal family. Thus, the union of uncle and niece, nephew and aunt, half-brother and sister was permitted, and in traditionary accounts we even read of a marriage between full brothers and sisters. As regards cousins, generally speaking, union with agnates is deprecated, while that with other cognates is not looked upon with disfavour, provided the woman is on the same line as the man or below it."

No authority was indicated by Major Sparks for the proposition that the Burmese customary law on this point is similar to the English canon law. Extracts from several Dhammathats collected at sections 232, 233 and 236 of Kinwun Mingyie's Digest, Volume I are direct authorities for negativing the propositions that a man may not marry his step-mother or his step-daughter and that a woman may not marry her step-father or step-son (64). U Chan Toon ~~Aung~~ wrote,

---

(63) Leading Cases on Buddhist Law, 5.
(64) U E Maung, Burmese Buddhist Law, 38.

"Regarding, however, the social disapprobation owing to consanguinity, it is not quite consistent with the English Canon Law. Marriages among first cousins are not permissible, but, among the Arakanese and inhabitants of Tavoy, it is allowed when the parties are related as tha-mee-myauk-tha သမီးမြောက်သား: i.e. being children of a brother and a sister but not of two mothers nor of two sisters. Then again, marriage with a deceased brother's (either younger or elder) widow is discountenanced." (65A).

U May Oung in his leading cases on Buddhist Law has pointed out that he had come across instances of a man marrying his deceased wife's mother and another, his deceased son's wife (65). The case of Mi Me v. Mi Shwe Ma (66) is an authority to the correctness of the statement that Burmese customs do not prohibit a man marrying his wife's sister, even during the life time of the wife.

In the Dhammathats there is no rule prohibiting intermarriages amongst near relations. The matter is left entirely to the sentiment of the people, and we have to ascertain the nature of incestuous marriages from the prevailing ideas of the present day. U E Maung in dealing with the subject, wrote: "The only reference to prohibited degrees in Burmese

(65A) The principles of Buddhist Law, 34-35.
(65) U May Oung, Leading Cases on Buddhist Law, 5.
(66) (1912) I U.B.R. (1910-13) iii (P.C.)

legal literature is to be found in the Attarasi Dhammathat, written in 1875 by Pagan Wundauk, whose official title was Thurimaharaja Thinkyan and who was appointed a judge by King Mindan. It declares alliances between persons standing in the direct ascending and descending line of relationship to be unnatural and unlawful". (67).

From the fact that the Attarasi Dhammathat was not referred to by the Kinwun Mingyi when he compiled his Digest in 1895, it would seem to be a Dhammathat of doubtful authority.

There is no case law on this subject and the question whether a particular union is void on grounds of consanguinity or affinity, if at all raised in the courts, will have to be determined in accordance with the prevailing custom or usage of the people in Burma. Recently, on an alleged custom, Govinda Menon, J., (68) said, "Requisites of a valid custom are that the same should be ancient, certain and reasonable and that it should also not be opposed to decency or morality. No custom which is opposed to public policy can be recognised by a court of law. Nor can immoral usages however much practised, be countenanced. As to the test of immorality it must be determined by the sense of the community as a whole and not by the sense of a section of the people. The civilised and cultured society in which we live and the progressive

---

(67) Burmese Buddhist Law, 39.
(68) Balusami v. Balakrishna, A.I.R. (1957) Madras 97.

country in which we are, should not approve of an incest which would not find favour even under primitive or tribal societies."

It is the duty of the legislature to lay down definitively the degrees of prohibition to remove all doubts and uncertainties that may exist in the minds of the people to be governed thereby. Some years ago, Government appointed a committee to draft a bill to codify the law of marriage and divorce among Burmese Buddhists. The committee drew up a table of prohibited degrees, which professes to be in accordance with the prevailing customs of the people of Burma. The table is as follows:-

Table of Prohibited Degrees

A man may not marry his	A woman may not marry her
1. Grandmother	1. Grandfather
2. Grandfather's wife	2. Grandmother's husband
3. Wife's grandmother	3. Husband's grandfather
4. Father's sister.	4. Father's mother
5. Mother's sister	5. Mother's brother
6. Mother	6. Father
7. Step-mother	7. Step-father
8. Wife's mother	8. Husband's father
9. Daughter	9. Son
10. Wife's daughter	10. Husband's son
11. Son's wife	11. Daughter's husband
12. Sister	12. Brother

Table of Prohibited Degrees (Contd.)

13.	Son's daughter	13.	Son's son
14.	Daughter's daughter	14.	Daughter's son
15.	Son's Son's wife	15.	Son's daughter's husband
16.	Daughter's son's wife	16.	Daughter's daughter's husband.
17.	Wife's son's daughter	17.	Husband's son's son
18.	Wife's daughter's daughter	18.	Husband's daughter's son
19.	Brother's daughter	19.	Brother's son
20.	Sister's daughter	20.	Sister's son.

6. THE WIVES.

(i) Polygamy.

Amongst the non-christians in Aisa, a person is allowed, during the life time of his first wife, to unite with another woman and give her the status of a wife. The same rule prevails amongst the Burman Buddhists. In this respect, a Buddhist marriage is quite different from a marriage in Christendom which is a voluntary union for life, of one man with one woman to the exclusion of all others and the present Hindu marriages in India (69). A study of the reported cecisions of the courts in Burma shows that it has never been suggested - even by the most acrimonious opponent of polygamy - that Burmese customary marriage is monogamous. It would be impossible to maintain such a position in a system where the

---

(69) Section 5(1) of the Hindu Marriage Act, 1955, enacts the rule of monogamy, and prohibits polygamy which was permitted by Hindu Law before the Act.

inferior wife and her children are accorded a legal status (70).

The Courts, while giving the recognition accorded it by the Dhammathats, do not favour polygamy to its fullest extent. In Ma Hlaing v. Ma Shwe Ma (71), Burgess, J.C., observed that, "the principle of Buddhist Law is that a man should have but one wife, but that in practice, relaxation of theory is allowed, and a state of concubinage or living with lesser wives is recognized, and provisions made for these lesser wives and their offspring shairing in the fathers estate." In Ma Wundi v. Ma Kin (72), the Privy Council accepted the principle that it is not forbidden to a Burman Buddhist to have two wives at the same time; and the same tribunal, in Mi Me v. Mi Shwe Ma (73) recognized the claim of two women to inherit an equal footing with each other as wives in the estate of a deceased Buddhist, stating that, "In Burma, polygamy is undoubtedly lawful." Whilst this last case was pending in the Privy Council, McColl, J.C., on an independent investigation of the texts and other authorities came to similar conclusions in Mi Kin Gale v. Mi Kin Gyi (74). It may, therefore, be said that Burmese Buddhist Law does not prevent a man from

---

(70) U E Maung, Burmese Buddhist Law, 41.
(71) (1893) II U.B.R. (1892-6) 153.
(72) (1907) IV L.B.R. 175 (P.C.)
(73) (1912) I U.B.R. 111 (P.C.)
(74) (1910-13) I U.B.R. 42.

contracting marriage with another woman during the subsistence of a valid marriage.

With the advance of civilisation among the Burmese, polygamy as an institution is on the decline, and in the present state of Burmese society, especially among the educated classes it has almost disappeared. U Tha Gywe is, therefore, right in saying that "the leading principle of Buddhism is rather monogamy than polygamy; polygamy is rare, it is tolerated but not largely practised, because it is considered disrespectable, and there are clear indications that it will become a thing of the past in the near future (75).

But, it is submitted that polygamy was never practised to a large extent even in ancient days. It was tolerated as an existing institution rather than viewed with approval (76). Only three texts out of the thirtysix Dhammathats mentioned the right of a man to have more than one wife (77). Even those texts do not give him that right unconditionally. The extract from the Kaingza is as follows:-

"A man may marry as many as ten wives if he can maintain them all by his own skill and labour. Although his parents may give him in marriage to another woman after he had already been married to one, the parents of the first wife shall not recover her."

---

(75) Buddhist Law, Vol. I, 91.
(76) Mi Me v. Mi Shwe Ma, (1912) I U.B.R. (1910-13) 111 (P.C.).
(77) K. Digest, Vol. II, sec. 253.

It is, therefore, clear that the right to marry more than one wife was extended only to those who could maintain them all by their own skill and labour. And that was why polygamy was common especially among the official class in Upper Burma before the annexation (78).

In Ma In Than v. Maung Saw Hla (79), the special court of Lower Burma held that, at Burmese Buddhist Law, where no special custom existed, a husband who, in the life time of his first wife, married a second wife without the first wife's consent, did not thereby commit a fault against the first wife, and that such a second marriage did not in itself constitute in Lower Burma, a ground for divorce. This decision was overruled by a Full Bench of the Chief Court of Lower Burma in Ma Ka U v. Po Saw (80) wherein Hartnoll, J., observed, rightly it is submitted, 'From a consideration of these texts, it seems to me clear that the Dhammathats do not in themselves sanction unlimited polygamy with the exception of the texts quoted in section 253 of the Digest, even supposing that the meaning and intention of those texts is to so sanction it. The Dhammathats seem to allow polygamy or the taking of a second wife under certain exceptional cases, and that is all, and they contemplate that the ordinary social life should be monogamous. There is authority for holding that the taking of a lesser wife and consequent ill-treatment of the chief wife

---

(78) Mi Kin Gale v. Mi Kin Gyi, (1910) I U.B.R. (1910-13) 42 at 47.
(79) (1881) S.J. 103.
(80) (1908) 4 L.B.R. 340 (F.B.).

shall end in the husband having to leave the house and forfeit the property, and certain texts go even further and authorize the obtaining of a divorce by the wife when her husband takes a second wife."

It is a serious matrimonial fault for a man to marry a second wife without the consent of the chief wife and during the life-time of the latter. The chief wife is entitled to demand a separate residence for herself, and where her husband refuses to provide her with it, she may claim maintenance from him under section 488 of the code of Criminal Procedure.

In Maung Hme v. Ma Sein (81), a Full Bench of the Chief Court of Lower Burma laid down the rule that except for the grounds set out in sections 219, 232, 265, 266, 267 and 311 of the Kinwun Mingyi's Digest, Volume II (82), a chief wife can obtain a divorce against her husband who has taken a second wife without her consent. This decision still holds good.

It may, therefore, be said that although their Lordships of the Privy Council distinctly recognized polygamy among Burmese Buddhists in Mi Me v. Mi Shwe Ma (83), it is clear that it now exists merely by sufferance, and there is a strong

---

(81) (1918) 9 L.B.R. 191 (F.B.).

(82) These sections allow the husband to marry a second wife during the lifetime of the first wife when the latter is inter alia barren, or bears only female children, or where she is leprous, insane, consumptive, maimed, blind, or paralysed, or is she habitually uses vile and abusive language to her husband.

(83) (1910) I U.B.R. (1910-13) 111 (P.C.).

feeling amongst the people against the practice (84). Burman Buddhists are rather monogamous than polygamous (85).

ii. Classification of Wives.

The Dhammathats (86) forbid illicit intercourse with twenty classes of women, namely:-

1. Maturakkhita - မာတုရက္ခိတာ A woman taken care of by her mother.
2. Piturakkhita - ပိတုရက္ခိတာ A woman taken care of by her father.
3. Mataputiturakkhita - မာတာပိတုရက္ခိတာ A woman taken care of by both her father and mother.
4. Bhaturakkhita - ဘာတုရက္ခိတာ A woman taken care of by her brother.
5. Bhaginirakkhita - ဘဂိနိရက္ခိတာ A woman taken care of by her elder sister.
6. Natirakkhita - ဉာတိရက္ခိတာ A woman taken care of by her relations.
7. Maitarakkhita - မိတ္တရက္ခိတာ A woman taken care of by her family.
8. Dhammarakkita - ဓမ္မရက္ခိတာ A woman taken care of by her friends of the same religious habits.
9. Thayakkita - သာရက္ခိတာ A woman taken care of by her protector.

---

(84) Ma Wun Di v. Ma Kin, (1907) 4 L.B.R. 175 (P.C).
(85) Ma Wun Di v. Ma Kin, (1907) 4 L.B.R. 175 (P.C).
(86) Manugye, Bk. VI, sec. 28.

10. Saparidana - သပရိဒဏ္ဍာ။ A woman who is punished by the king or officers of the state.

11. Dhanakkita - ဓနက္ကိတာ။ A woman to whom property has been given and who is living under the protection of the giver.

12. Chandavasini - ဆန္ဒဝသိနီ။ A woman who lives together with a man by mutual consent.

13. Bhagavaseni - ဘောဂဝသိနီ။ A woman who lives together for wealth and comfort.

14. Patavasini - ပဋဝသိနီ One to whom clothes have been given and who cohabits with the giver.

15. Odapattakini - ဩဒပတ္တကိနီ။ One with whom a man, putting his hands in the same cup of water, has avowed that as the water is one without division, so will they be.

16. Ob hatasumbhata - ဩဟတသုမ္ဘတာ။ One whose pad (for bearing burdens) has been removed from her head and is taken to live with the man (who relieved her).

17. Dasi bhariya - ဒါသိ ဘရိယာ a slave wife.

18. Muhuttika - မုဟုတ္တိကာ။ A woman taken for a short time.

19. Kammakaribhariya - ကမ္မကာရိဘရိယာ။ One got in return for service performed.

20. Dhajahata - ဓဇာဟတာ။ A woman taken in war from an enemy's country, where the sacred standard is unfurled i.e. a captive woman.

It may be pointed out that the woman belonging to classes 11 to 20 are included in the above classification of wives from religious and moral considerations rather than rules of positive law. The classification is borrowed from Vinya Attakatha (87) which was Buddhaghosa's commentary on the five books of Vinaya Pitaka which contains the rules and regulations of the Buddhist priesthood. Buddhaghosa lived in or about the 5th century A.D. and his works formed the chief sources of the religious portions of the Dhammathats.

From the Lawyer's standpoint the above classification of wives has no significance at all, as rape and seduction are governed, not by Burmese Buddhist Law, but by the Penal Code and the English rules in Tort (88).

The Dhammathats mention five kinds of wives among Burmese Buddhists, namely: (89)

1. A purchased slave.
2. One who is inferior to the husband in birth or social status
3. One who is higher than the husband in birth or social status.
4. One who is on the same level as the husband in social rank, and
5. A lesser wife.

Slavery has been abolished and class distinctions are of

---

(87) U E Maung, Burmese Buddhist Law, 30-31.
(88) Mi Kin v. Nga Myin Gyi, (1882) S.J. 114.
(89) Digest, II, sec. 226.

no legal significance in Burma. Only the dinstinction between the superior wife ဖခေါင်းမယား and lesser wife ဖခေါင်းငယ် is of importance in the present law administered by the courts.

The Dhammathats mention the following six kinds of sons who are entitled to inherit (90):

1. Orasa - son born of a couple given in marriage by their parents.
2. Hetthima - son born of a 'tawpyaung'.
3. Khettaza - son born of a slave wife.
4. Kittima - son adopted with an intention that it shall inherit from the adoptive parents.
5. Pubbaka - son brought to the subsequent marriage by either spouse; and
6. Apatitthika - son casually adopted with no intention that it shall inherit from the adoptive parents.

From the aforesaid classifications of sons who are entitled to inherit, it may be inferred that the Dhammathats recognized only three kinds of wives, viz:-

(a) A 'superior' wife ဖခေါင်းမယား who gives birth to an Orasa son.

(b) A 'tawpyawng' or apyaungmaya ဖခေါင်းငယ် who gives birth to an hetthima son; and

(c) A 'slave wife' who gives birth to a Khettaza son.

---

(90) Digest, I, sec. 16.

Wives other than the aforesaid three, had no legal rights as against the men with whom they united and were not wives in the strict sense of the word. With the abolition of slavery in Burma, the slave-wife disappeared from Burmese society, and it may now be taken as settled that Burmese Buddhist Law recognises only the remaining two wives. The "superior wife" probably corresponds the 'Odapattakini' and the 'tawpyaung' or 'Apaung-maya' with the 'Chandavasini'. (91)

iii. Classes of wives recognised in Modern Jurisprudence.

(a) Superior Wife.

The superior wife is sometimes called a let-son-maya. It means the wife who eats out of the same dish with her husband and it means a wife who lives on terms of equality with her husband; but eating together in itself is not an essential of a valid marriage. It is merely a proof of social equality between the husband and wife (92). U E Maung, therefore, rightly, it is submitted, said, "Eating together being an outward and visible sign of social equality, it was useful as a proof that a man, united to a woman of lower degree, raised her to his own social position by eating out of the same plate with her. But sharp social distinctions exist no longer and eating together has lost all its original significance (93)."

---

(91) No. 15, 12, classifications of wives.
(92) Ma Gwe v. Ma Thi Du, II U.B.R. (1892-96) 194; Mikin Gale v. Mi Kin Gyi, (1910) I U.B.R. 42.
(93) Burmese Buddhist Law, 44.

Hence eating together out of the same dish means no more than joint residence now-a-days (94). Burmese Buddhist Law recognised polygamy, and that a Burman might marry two or more women at the same time, and that they might all have the status of a wife and not that of a concubine, that the woman first married was the chief wife and that as long as she was not divorced, her status could not be lowered by any conduct of the husband, except perhaps if she were barren (95).

(b) Inferior Wife.

Maungye, defined a 'tawpyaung' as a woman who openly lives with a man having a 'superior wife', but who does not eat out of the same dish with him (96). It is obvious from this definition that 'tawpyaung' is not a 'superior wife'. In Rajabala, she was described as 'aniyaya'. In Manu, she was called 'anugharani' (အနုဃရိကမိ) who is an 'inferior wife' ပဓာန မဟေသီ ကဲ့ kept by the man either during or after the lifetime of his 'superior wife' (96). It is clear from the Dhammathat that a 'tawpyaung' is entitled to inherit from her husband under certain circumstances, although the superior wife may be still living (97), her hetthima child is legitimate and also entitled to inherit from its father on the same footing as the son of the superior wife (98). Her status is

---

(94) Ma Thein Yin v. Mg. Tha Dun, (1923) 2 Ran. 62.
(95) Mi Kin Gale v. Mi Kin Gyi, (1910) I U.B.R. 42.
(96) Digest, I, sec 276. U E Maung, Burmese Buddhist Law, 33
(97) Mg. Tha Dun v. Ma Thein Yin, (1923) I Ran. 1.
(See under 'Inheritance', Inferior Wife.
(98) Digest, I, sec. 16.

entirely different from that of the concubine in Roman Law who had not the status of a wife, and whose child was not legitimate, but only capable of legitimation by subsequent marriage (99). A 'tawpyaung' is but an 'inferior' wife. Her status is below that of a 'superior wife', but evidently higher than that of a concubine or mistress who has no claim to inheritance under any circumstances. She occupies the peculiar status of one who is not a wife in the strict sense of the English word, ,and yet is not a mere mistress (100).

(iv) Proof of Status.

Although the main distinction between 'superior' and 'inferior' wives in olden days centred around the question whether or not the husband ate with the woman out of the same dish, sharp social distinctions had long passed away among Burmese Buddhists, and consequently, eating together out of the same dish no longer serves as the criterian to decide which wife is 'superior' and which is 'inferior' (101). Moothan, rightly, it is submitted, observed; "The distinction between wives in the fullest sense (or 'superior' wives) and 'inferior' wives, which is of great importance with regard to the rules of inheritance, is one of fact, Were both accorded equal and similar rights by the husband? Were both recognized as of equal status by their neighbours? Had each an equal

---

(99) U E Maung, Burmese Buddhist Law, 32.
(100) Ma Thein Yin v. Mg. Tha Dun, (1923) 2 Ran. 62.
(101) U E Maung, Burmese Buddhist Law, 44.

share in the care and management of the husband's estate? Did the husband live indifferently with each? Unless the answers to questions such as these is in the affirmative, the status of one of the women is not higher than that of an inferior wife." (102)

In Ma Shwe Ma v. Ma Hlaing (103) the common household duties that the inferior wife had to perform, her position in the household of the superior wife, the want of publicity attending the intimacy; and her acquiesance in a summary dismissal were taken into consideration in determining her status. The inferior wife was a dependant originally in the superior wife's household and went along with her, to the husband's house and there intimacy began; such special conditions obtaining in the case make the decision not very helpful in the altered state of society obtaining at the present day. Ma Kyin v. Ma Saung (104) is more helpful. It decides in effect that a woman having a separate establishment from the husband, taking no share in the management of his business, and performing no other duties of a wife than receive his visits is not a superior wife. Where a Burman Buddhist, having a chief wife in one place, kept a woman at another place, who received his visits unknown to the chief wife, but with prior

---

(102) O. M. Mootham's Burmese Buddhist Law, 18.
(103) (1893) II U.B.R. (1892-6) 145.
(104) (1874) S.J. 27.

knowledge of the existence of the chief wife, who took no part in the man's business and was not publicly recognised as of equal status with the chief wife; it was held that that the woman was at best an inferior wife (106). Where a man has a wife and visits another woman with whom he never goes out in public, who does not associate with his relatives or friends, it is a case of concubinage which does not entitle the woman to claim maintenance or inheritance (107). Separate living from the husband raises a presumption that the wife living apart is not a 'superior wife', but this presumption is not irrebutable (108). In Maung Tha Dun's case (109), May Oung, J. pertinently observed that when an inferior wife claims to inherit on the death of her husband, the proof she is required to furnish must be more strict when she had previous knowledge of the existence of the first wife, from whom she lived separately and to whom she was unknown.

It is possible for a Buddhist man to have two wives occupying identical positions both in respect of personal and proprietary rights; in that case, both wives are 'superior' wives,(110). In Ma U Byu v. Ma Hmyin (111), the status of the wife subsequently taken was determined by the treatment accorde to her by the husband relatively to that given to the first

---

(106) Maung Tha Dun v. Ma Thein Yin, (1923) I Ran. 1.
(107) Ma Thein Yin v. Mg. Tha Dun,(1923) 2 Ran. 62.
(108) Ma Thein Yin v. Mg. Tha Dun,(1923) 2 Ran. 62.
(109) (1923) 2 Ran. 62.
(110) Mi Me v. Mi Shwe Ma,(1912) I U.B.R. III; 39 I.A. 57.
(111) (1900) II U.B.R. (1897-01) 160.

wife; as it appeared that the same treatment was accorded to her by the husband as to the first wife, she was held to be a superior wife.

McColl, J.C., in Mi Kin Gale v. Mi Kin Gyi (112), defines a chief wife as one who lives on terms of equality with her husband - equality in all respects, personal and proprietary. In Maung Tha Dun v. Ma Thein Yin, (113) May Oung, J., described 'superior wives' as women who occupy identical positions, both in respect of personal rights and obligations and as regards the ownership of property; and goes on to state of 'inferior wives' that they are persons with whom the husband enter into and maintain conjugal relation but whose position falls short of that of the 'superior wives', in that they are not endowed with proprietary rights, as distinct from personal rights. An inferior wife is not a mistress. It is a mistake to use the word "mistress" with reference to a lesser wife among Burman Buddhists. The Buddhist law speaks of wives and concubines. The mistress of Western Europe is a different thing from the concubine of the Dhammathats. To convert a wife or even a lawful concubine into a mistress seems to be consistent neither with Buddhist Lawnor with the cause of religion and virtue (114).

(v) Share of Inferior Wives.

It is now regarded as settled law that an inferior wife living with her husband is, upon the death of her husband,

(112) (1910) I U.B.R. 42.
(113) (1923) I Ran. 1.
(114) Mi Shwe Ma v. Mi Me, (1909) I U.B.R. 114; 39 I.A. 57.

entitled to two-fifths of the vested share of her husband, the other three-fifths going to the superior wife (115). The share of the superior wife cannot be adversely affected by his taking a number of inferior wives; if there are two or more inferior wives, they will share that two-fifths equally. And if there are two or more superior wives, they will also share that three-fifths equally.

Where an inferior wife lives separately from her husband, she is not entitled to any inheritance (116). But she is allowed to keep so much of her husbands property as passed into her possession while he was alive (117). Hence, once the status of an inferior wife is established, her right to share her husband's estate will be determined conclusively, according as to whether or not she had lived with him during his lifetime.

(vi) BURMESE Expressions for describing women who cohabit with a man.

There are other certain common terms by which a Buddhist woman cohabiting with a man is known in modern society. Ngai-Maya is an honourable term to denote the wife whom a man first marries in his youth. It must not be confused with the tern 'maya-ngai' which is less respectable, in that although it strictly means an inferior wife, it is frequently misapplied to a mere mistress or a concubine who has not the status of a

---

(115) Mi Me v. Mi Shwe Ma, (1912) I U.B.R. (1910-13) 111 (P.C.).
(116) Ma Than v. Ma Kyin, (1925) 3 Ran. 656.
(117) Ma Gwe v. Ma Thi Da, (1891) II U.B.R. (1892-96) 194.

wife. Their Lordships of the Privy Council had, therefore, struck a note of warning against indiscriminate and loose use of the term 'maya' as the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable term (118).

Apyaw-Maya is a woman kept by a man simply for the sake of sexual pleasure; she is not a wife in the true sense of the word. She is a mistress or a concubine. The man never intends to give her the status of a wife. A child born of such woman is illegitimate.

Eindaunggyi-Maya is the term applicable to a wife who at the time of marriage was either a widow or a divorcee. Her age is immaterial.

Pwe-tet-Maya is an epithet for the superior wife of a official who alone was recognized by the king or officials of the state. Before the annexation, it was customary for a Burmese official to have two or more superior wives, but only one of them was received by the king at his palace, and she was commonly known as "pwe-tat-maya" or "pwe-win-Maya" equivalent to "min-thi-soe-pauk-maya", meaning a superior wife of a respectable Burman who alone is introduced to high officials as his wife (119).

---

(118) Mi Me v. Mi Shwe Ma, (1912) I U.B.R. (1910-13) 111 (A.C.)
(119) U E Maung, Burmese Buddhist Law, 31.

Let-son-za-Maya is a wife who lives and eats with her husband (120). Originally, it means the wife with whom the husband ate out of the same dish as the outward symbol of social equality. As previously stated, eating out of the same dish with the husband was in early times, the sole distinction between a superior wife (maya-gyi) and an inferior wife (taw-pyaung).

Myaukma, (Monkey wife) and "Myaukkti" (Monkey husband) are often mentioned in the Dhammathats. At the present day, the former denotes a married woman who keeps a paramour, and the latter denotes the paramour himself who is often known as "lin-ngaii". Sir John Jardine in tracing the origin of these terms, said (121):

"Most Europeans, and even some of the younger Burman magistrates, are ignorant of the meaning of the terms 'monkey-wife' and 'monkey husbands' မျောက်မ ။ မျောက်ထီး ။ They relate to habits of monkeys who usually live in distinct groups, in which a male is often united to one or more particular females, but if gone abroad or strayed away to another group, finds there sufficient considerations for his wants to have a female allotted to him, especially if he be a powerful monkey; or he will appropriate a temporary partner and take the consequence of being compelled to remain in the new tribe

---

(120) S. C. Lahiri, Burmese Buddhist Law, 42.
(121) Notes VIII. Remarks under sec. 14 of translations from Mohavicchedanî.

or of recognizing his newly acquired partner as consort or of being driven out of the community. The lower and formerly oppressed races of Burma sometimes allowed their guests to cohabit with unmarried females of their household; some females became the myaukmas during the guests' stay; and what was originally an act of hospitality was afterwards claimed as a privilege by Burman lords when absent from their families and residing temporarily in other places. In the same way, a married merchant coming from a distant place for trade may keep a woman as if she were his wife, she attending to his business and cohabiting with him only; their temporary relationship is that of myaukma and myaukhti; the woman may thus support herself as the temporary wife of weveral men in succession without sinking to the level of a courtesan. A married woman, if she cohabits in this way - with a guest or visitor, also becomes a myaukma and he a myaukhti, his status being similar to that of 'lin-ngai' or lesser husband. It is by enquiry into the customs of the Karens and Chins that fuller acquaintance will be made with these subjects."

7. Proof of Marriage.

"In the olden days, a marriage was actually a setting-up of a house (ein-taung-kya-de). The people lived in collections of small dwelling places, and when a new couple became man and wife, a new place of residence, where they would 'live and eat together', was put up for their use, either immediately or as

soon as practicable afterwards. Thus, the fact of their union could not but become known to all in the village (122). Under the old conditions of Burmese society there could hardly arise any question as to the fact of a marriage. In villages, where every one knew everybody else, secrecy would have been well-nigh impossible. Even in towns, the inhabitants of each 'quarter' or locality were generally united by ties of friendship, strengthened by common religious observances and mutual interests; regarding each other as yat-swe-yat-myo, i.e. relatives on account of locality, the neighbourhood was in many respects like a large family group, bound to render aid to each other in joy and in pain, (tha-hmu-ná-hmu). The union of a man and a woman could not escape notice and comment under such circumstances. At the present day the pattern of life has changed, more especially in the cities and large towns. With the admixture of alien elements, ideas of neighbourly regard have all but vanished in many places, and each household goes its own way without much concern for the affairs of others. Hence, it may happen that a marriage is contracted, without show or ceremony or feasting, unknown to the people of the locality. For instance, where the contracting parties have been married before it is not usual to have a reception; unless the pair lived together openly as man and wife, it might possibly be difficult to prove a marriage in such a case (123)"

---

(122) U May Oung , Leading Cases on Buddhist Law, 13.
(123) U May Oung , Leading Cases on Buddhist Law, 21.

"Cases often arise in which it is necessary for the Court to decide whether an alleged union of a man and woman constitutes a legal marriage or not. Where there has been a formal ceremony or where public announcement has been made by the contracting parties or their parents, there is no difficulty, but where no such formality or announcement can be put forward and the fact of marriage is denied by the opposite party, other matters must be enquired into, and this is not always a matter of ease. As late as 1904, it was a subject of complaint that as regards the legal requirements of a valid marriage between Burman Buddhists, and the degree of proof necessary to establis the fact of a marriage, there is a singular dearth of authority (124)".

Modes of Proof.

Marriage may be proved in one or more of the following ways:-

(1) by admission of the parties.

(2) by inference.

(3) by repute.

(1) Admission - Where a Burman Buddhist man and a Burman Buddhist woman have lived together and admitted their status of husband and wife, either orally or in writing, no further proof is required. It is submitted that consumation of marriage is unnecessary to create the marriage status where the

---

(124) U May Oung, Leading Cases on Buddhist Law, 20.

parties have otherwise established their mutual consent to become husband and wife.

Inference - In the absence of direct proof, marriage may be inferred from the conduct of the parties towards each other. Where the parties had lived together for some years openly as man and wife and there is evidence to show that they were all along regarded as such by their friends and neighbours, there is a very strong presumption that the parties are husband and wife (125). But joint-residence and eating together are no longer requisites of a valid Buddhist marriage (126). Separate residence does not prevent a woman from establishing her status as a wife, but there is a presumption, though not irrebutable, that a woman living apart from her husband is only a tawpyaung (inferior wife) who is not entitled to share her husband's estate, unless she had lived with him during his life time (127).

Circumstances for consideration.

The following circumstances should be taken into considera tion, where reliance is placed upon the conduct of the parties to establish the married status; (128):-

---

(125) Vanoo Gopaul v. Kritsnaswamy Mudaliar, (1905) 3 L.B.R. 25; Anamalay Pillay v. Polan, (1906) 3 L.B.R. 228; Ma Kyin Hlaing v. Maung Kyin Swi, (1937) Ran. L.R. 90; Mg. Mg. v. Ma Sein Kyi, (1940) Ran. L.R. 562.

(126) Ma Gywe v. Ma Thi Da, (1891) II U.B.R. (1892-96) 194;

(127) Ma Than v. Ma Kyin, (1925) 3 Ran. 656.

(128) S.C. Lahiri, Burmese Buddhist Law, 43; Vanoo Gopaul v. Kritsnaswamy Mudaliar, (1905) 3 LBR. 25; Anamalay Pillai v. Polan, (1906) 3 L.B.R. 228; Ma Kyin Hlaing v. Maung Kyin Swi, (1937) Ran. L.R. 90; Mg. Mg. v. Ma Sein Kyi, (1940) Ran. L.R. 562.

(1) Whether the parties had lived together openly;

(2) Whether on the death of the man the woman behaved like a widow at the funeral; whether on the death of the woman the man behaved like a widower;

(3) Whether they visited their friends and relatives in each other company;

(4) Whether they visited the pagodas and monastries together;

(5) Whether their parents and relatives treated them as a married couple;

(6) Whether the character and positions of the parties and their parents are such as to render marriage probable;

(7) Whether there are circumstances to indicate that the relationship between the couple is regarded by their friends and neighbours as clandestine or illicit;

(8) Whether the man was previously married, or has a wife living with him;

(9) Whether the couple had bought any property, and carried on trade or business in their joint-names;

(10) Whether the issue of the couple, if any, are treated in a manner worthy of legitimate children by their father; and

(11) Whether the couple had ever performed public functions and ceremonies, and invited the people in their joint names.

It is the cumulative effect of consideration of the said circumstances which will enable the Court to decide whether the parties are legally married under Burmese Buddhist Law.

Repute

From earliest days, disputed marriages were decided by repute, and Manugye (129) gives the following account of one of the decisions by the young cowherd, who afterward, became the Rishi Manu:-

"The disputed wife: Two men disputed the possession of a wife. When they came before the wise man, he enquired into the case. Both the men claimed the woman, and she declared one to be her husband. It would appear that the man the woman says is her husband, should have her; but on the statement of the woman only, the case is not clear. So, he separated the three and examined them apart; but being all of one village their statement as to fore-fathers, names, numbers and heriditary property, agreed. "The case cannot be decided by the questioning of ordinary men. It must be decided by the ordeal of water, rice, fire or (hot) lead; one of these four." Having said this, he called their parents, relatives, connections and neighbours and examined them. They all agreed in stating one to be her husband. He then said, 'It shall not be tried by ordeal. Let the man all agree to be the husband have the wife ..... . On this occasion, the Natss of the forests and hills praised and shouted applause, This also is one decision."

---

(129) Manugye, Bk. I, sec. 8.

In Mi Me v. Mi Shwe Ma (130), their Lordships of the Privy Council observed that "where proof of marriage depends wholly or mainly on reputation, the circumstances of the case must be scrutinised with some caution, because the word maya which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms." Where marriage is tried to be established from co-habitation with habit and repute it becomes necessary to make sure that there are the conditions required for its existence. There must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise.

A reputation can only be established by means of admissible evidence. Section 50 of the Evidence Act says, "When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who as a member of the family or otherwise, has special means of knowledge on the subject is a relevant fact." The witness must prove conduct on the part of the man and woman or on the part of their friends and neighbours, from which the court can draw this conclusion. It is not for the witness to draw the conclusion himself and to express a mere opinion about the very matter which the court has to decide (131). In

---

(130) (1912) I U.B.R. (1910-13) III P.C.; 391.A.57.
(131) Maung Maung v. Ma Sein Kyi, (1940) Ran. L.A. 562.

Maung Son v. Ma Thet Nu (132), the village headman assessed the couple to capitation tax as a married pair. His conduct in so doing was held to render admissible evidence of his opinion regarding their relationship.

Proof of Re-union after Divorce.

If after marriage a man divorces his wife and afterwards re-unites with her, strict proof of the renewal of conubial relations is required (133). The re-union must be as public as the original union. Mere physical re-union is not sufficient to revive the status of marriage. The re-union must be of such a nature that, had there been no divroce, it would have amounted to a valid marriage (134). Clandestine chance intercourse is not sufficient to revive the marriage dissolved by divorce (135). When the parties to a divorce re-unite after separation there is a complete restoration of the status quo ante, and they stand on the same footing as if there had been no divorce (136).

(8) Breach of Promise of Marriage.

(i) What constitutes promise of marriage.

In order to found an action for breach of promise, it is necessary that the parties shall have mutually entered into

---

(132) (1904) 10 B.L.R. 166 at 168.
(133) Maung Lu Gyi v. Ma Nyan, (1895-96) 2 U.B.R. (1892-96) 202.
(134) Maung Po Lat v. Ma Ngwe Ma, (1919) 3 U.B.R. (1917-20) 182.
(135) Maung Po Lat v. Ma Ngwe Ma, (1919) 3 U.B.R. (1917-20) 182.
(136) Mi Saing v. Nga Yan Gin, (1914) II B.L.T. 89.

a valid contract to marry; a mere promise to marry made to one party would not be sufficient foundation for the action unless accepted by the other. The promise and acceptance, however, need not be concurrent but must be within a reasonable time of each other (137). The Law, it appears, does not require that there must be an express promise of marriage, and such promise may be implied from the circumstances of the case. Thus, in Maung Shwe The v. Ma E Bon (138), the plaintiff asked the defendant if he was going to be honest with her and he replied that although he had a bad reputation with reference to women, he would be honest this time, and it was held that the words under the circumstance constituted a promise of marriage. A promise to marry is a promise to marry within a reasonable time, when no date has been fixed for the marriage, otherwise no breach could be assigned (139). A conditional promise to marry is perfectly valid, and no action will lie until the condition has been fulfilled; for instance, if the contract is to marry after a fixed period, no suit can be maintained until the time for performance has arrived, unless the defendant, before the fulfilment of the condition, absolutely refused to carry out his part of the contract(140).

---

(137) Eversley on Domestic Relations, 11.
(138) (1922) I B.L.J. 259.
(139) When v. Sellar, (1926) 1 K.B. 536.
(140) Donaghue v. Marshall, (1875) 32 L.T. 310.

(ii) Nature of Marriage Contract.

Before we discuss the rights and remedies of a party against the other for breach of promise to marry, it is necessary to ascertain the nature of a contract to marry with a view to discover whether Burmese Buddhist Law or the Contract Act (IX of 1872) governs an action for its breach. Section 13 of the Burma Laws Act (XIII of 1898) lays down that 'any question regarding marriage' of Buddhists shall be decided in accordance with the principles of Buddhist Law, except in so far as such law has been altered, abolished or otherwise affected by any enactment, or is opposed to any custom having the force of law. If the promise of marriage does not fall within the category of 'question regarding marriage' as contemplated by section 13 of the Burma Laws Act, 1898, then Burmese Buddhist Law will be clearly inapplicable and the contract Act, 1872. will apply. A separate question is what is the age of majority for a contract to marry. The Majority Act 1875 states expressly that its provisions do not apply to capacity to act in matters of marriage (141). There were conflicting decisions on this point.

Sir John Jardine in his notes on Buddhist Law siad, "In a recent appeal, however, it was held by the Judicial Commissioner that a woman who has been injured by breach of promise of marriage may sue for reasonable damages." (142). But that

---

(141) Burma Laws Act (1898), sec. 13.
(142) Jardine - Notes I, para 23.

decision was not published and consequently, it is impossible to find out whether a 'promise of marriage' was held to be 'a matter of marriage' within the meaning of section 13 of the Burma Laws Act, 1898 (143).

The first decision touching the point was made in Lower Burma in Maung Hmaing v. Ma Pwa Me (144) by the Special Court (145) on a reference made to it by the Judicial Commissioner

---

(143) See under Introduction supra.
(144) (1891) S.J. L.B. 533.
(145) As doubt has prevailed as to whether or not suits for breach of promise will lie, the question was referred to special courts under section 67 of the Lower Burma Courts Act - (Act XI of 1899). Section 67 provides:- "If in any civil suit or appeal or in any criminal case or appeal pending in the Court of the Judicial Commissioner or in the Court of the Recorder, the Court wishes to obtain the opinion of the Special Court on any question of fact or law or of custom having the force of law so as to the construction of any document or the admissibility of any evidence, or to obtain the assistance of the special court for the determination of the cases pending before it, such Court shall record a memorandum to that effect, and the special Court shall, as soon as may be convenient, sit for the disposal of the question and for the determination of the pending case, section 68 provides:- Any decree, order or sentence passed by the special court in a case tried under section 65 or a memorandum recorded under 67, shall issue, as, and be deemed to be, a decree, order or sentence of the Court from which the case was referred to the special court.
Section 62:- (1) The special court shall ordinarily be constituted by the Judicial Commissioner and the Recorder sitting together,
(2) But the local government may direct that for the hearing of any particular case or class of cases the special court shall be constituted by the Judicial Commissioner, the Recorder and the Judge of the Town of Maulmein, sitting together, and the local government may cancel any such direction.
see the Burma Code (3rd Ed. 1899).

on certain issues namely,

"Whether as between the Burmans an action for breach of promise of marriage lie."

The Judicial Commissioner in his order of reference said (146), "It will, or course, be remembered that it is not a case of succession, inheritance, marriage or religious usage, and consequently it must be decided rather by the Contract Act than by Burmese Buddhist Law."

The special court treated the suit as one for damage for breach of contract and held that the action would lie, because there was nothing in Burmese Buddhist Law to prohibit such an action. It must be pointed out here that the question whether a promise to marry is a 'matter of marriage' within the meaning of s. 13 of the Burma Laws Act 1898 was not under reference at all (147).

The view expressed in the order of reference in Mg. Hmaing's case was accepted in Lower Burma by Ormond, J. in Tun Kyin v. Ma Mai Tin (148).

In Ma Yon v. Maung Po Lu (149), the Judicial Commissioner held that a suit for damages for breach of promise of marriage would lie between Burmans, but the law applicable was not discussed.

In Upper Burma, however, Shaw, J., held in Kan Gaung v. Mi Hla Chok (150) that a promise of marriage and breach thereof

---

(146) Maung Hmaing v. Ma Pwa, Me, (1891) S.J. L.B. 533.
(147) ibid.
(148) (1919) 10 L.B.R. 28.
(149) (1900) II U.B.R. (1897-01) 499.
(150) (1907) II U.B.R. (1907-09) Contract 5.

are questions relating to marriage and must, therefore, be decided according to Burmese Buddhist Law. Relying on certain sections of the Kinwun Mingyi's Digest, (151) it was held that a suit for damages for breach of promise would still be maintainable as the Buddhist Law authorized compensation in such a case. This view was accepted by Heald, J. in Maung Nyein v. Ma Myint (152).

It may be pointed out that the state of society during the days when the Dhammathats were written did not contemplate suits for breach of promise to marry. They only dealt with seduction and clandestine intercourse, and Kan Gaung's case went wrong in failing to consider this.

U May Oung (153) in his leading cases on Buddhist Law, favoured the view expressed in Kan Gaung's case (154) and said, "It is submitted that the Upper Burma view is correct, since the marriage must necessarily be preceded by an undertaking express or implied to marry, and a breach of such undertaking is part and parcel of the subject. That a promise to marry is a valid agreement under the Contract Act is true, but the law regarding contract in general was formed or grew up in connection chiefly, with commercial transactions, whereas the marriage contract pertains to personal relations between the

---

(151) Digest, Volume II, secs. 50, 53, 54, 64, 73, 75, 78, 83, 88, 142, 143 and 149.
(152) (1918) 3 U.B.R. (1917-20) 75.
(153) Leading Cases on Buddhist Law, 23.
(154) (1907) II U.B.R. (1907-09) Contract 5.

parties. But be that as it may, it is settled law that a suit of this nature is maintainable by Burman Buddhists."

This question was considered by a Full Bench of the Chief Court of Lower Burma in Maung Gale v. Ma Hla Yin (155) wherein Robenson, C.J., who delivered the Judgment said, "Every marriage must be preceded by an offer and its acceptance. The prior agreement to marry is an integral part of every marriage. Any question, therefore, arising in connection with the promise must be held to be a question regarding marriage." There is no doubt that this decision is in accordance with U May Oung's view.

Some years later, the correctness of the above decision was questioned before a Full Bench of the Rangoon High Court in Maung Tun Aung v. Ma E Kyi (156). Page, C.J., after distinguishing an agreement to become husband and wife in prasenti, which forms an integral part of a Burmese Buddhist marriage, and a promise to marry in futuro,

"which may or may not in the event be found to have been the precursor of a marriage, but which neither affects the status of the parties tothe contract nor forms an integral or any part of the proposed marriage." (157)

---

(155) (1921) II L.B.R. 99 (F.B.)
(156) (1936) 14 Ran. 215 (F.B.). In this case the question referred to the Full Bench was 'whether the Burmese Buddhist Law forms the rule of the decision as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of majority fixed by the Indian Majority Act."
(157) Mg. Tun Aung's case (supra.) at p. 226.

and expressed the opinion that entering into an agreement to marry in the future is not 'an act in matter of marriage' within the meaning of section 2(a) of the Majority Act 1875; that such agreement being antecedent to, and forming no part of the proposed marriage, suits for damages between Burmese Buddhists are governed by the Contract Act 1872 and not by Burmese Buddhist Law.

It is submitted that this decision is correct and that it has far reaching effects, as will be seen below.

(iii) Capacity to enter into marriage contract.

It is now settled that the contract to marry in futuro is governed by the Contract Act 1872, and not by Burmese Buddhist Law. It followed, therefore, by virtue of S. 11 of the Contract Act read with S. 3 of the Majority Act that a Burmese Buddhist, who had attained the age of 18 years and was of sound mind, was competent to contract a valid promise of marriage.

The position with regard to the capacity of a Burmese Buddhist woman to enter into such a contract is more difficult, for consideration has to be given to the effect of the rule that a girl under the age of twenty (unless emancipated from parental control by a prior marriage which has been determined by death or divorce) cannot marry without the consent of her parents or guardians (if any) (158). It is, therefore, clear

---

(158) Ma E Sein v. Mg. Hla Min, (1925)3Ran. 455 (F.B.).

that an unmarried girl below the age of twenty cannot, without the consent of her parents or guardians, make a valid promise of marriage the performance of which is to take place before she attains that age. But can she, with the consent of her parents, make a valid promise at the age of eighteen to be married at nineteen? On principle there would appear to be no objection. Whether a girl, aged 19, having parents but without their consent, can make a valid promise to be married when she attains the age of 21 is not free from doubt. Such a contract would appear to be repugnant to the spirit of Burmese Buddhist Law and the court might hold the promise to be invalid on that ground (159).

Mya Bu, J., in Ma Pwa Kywe v. Maung Hmat Gyi (160), said, "I have no doubt that the proposition that a Burman Buddhist who is under the age of eighteen is not competent to enter into a valid or binding contract to marry in futuro, is applicable as well to a case where the promisor is a major and the promisee is a minor, for a marriage is a matter to which there must be two parties and there cannot be a valid contract to marry unless there are reciprocal promises between them amounting to an agreement to marry in futuro. The technical use of the word 'promise' into the Contract Act is far narrower than the popular use. Express words of promise often are in Law no more than a proposal." It was accordingly held that

---

(159) O. H. Mootham, Burmese Buddhist Law, 24.
(160) (1938) R.a.n. 667 at 669.

the plaintiff (the girl) being a minor was not competent to enter into a contract at the time of the alleged promise, and the agreement or the breach of which the plaintiffs suit was founded did not constitute a contract upon which an action for damage of breach could be based.

In Tun Kyin v. Ma Mai Tin, (161), Ormond, J., held that, although a promise of marriage is governed by the contract Act, 1872, it is only voidable when made by a Burmese Buddhist youth under eighteen years of age without his parents consent. But where he has clandestine intercourse with a woman whom he has promised to marry, his parents are not at liberty to withhold their consent to the marriage; he is bound by his promise and can be sued for its breach. It is submitted that the better opinion is in the Privy Council case of Ma Lori Bibi v. Dharnodas Ghose (162) that a minor's contract is absolutely void; this applies to a contract of marriage. A minor's agreement, being a nullity, has no existence in the eyes of the law. In English Law it has been held that a suit does not lie for a breach of a promise to marry made by an infant (163) unless there has been a fresh promise to marry after attaining age, as distinct of the original promise, e.g. by fixing the wedding day (164), or by such declaration as, "Now I may and will marry you as soon as I can (165). In

---

(161) (1918) 10 L.B.R. 28.
(162) (1903) 30 I.A. 114.
(163) Coxhead v. Mullis, (1878) 3 C.P.D. 439.
(164) Ditcham v. Worrall, (1880) 5 C.P.D. 410, 420.
(165) Northcote v. Doughty, (1879) 4 C.P.D. 385.

Mg. Tun Aung v. Ma E Kyi (166) a full bench of the Rangoon High Court held that "Capacity to act in the matter of Marriage" in the Majority Act did not refer, and was inapplicable to a pre-nuptial agreement to contract a marriage in futuro. The Contract Act and the principles of English Law set out above apply to such agreements.

(iv) Remedies for Breach of Contract of Marriage.

Sec. 21(b) of the Specific Relief Act, and the illustration thereto makes it clear that a contract of marriage can not be specifically enforced.

The Dhammathats contain numerous passages dealing with return of gifts and payment of damages in case of breach of the contract of marriage, both on the part of the parents (167) and of the daughter (168). Thus, in section 68 of the Digest is is laid down:-

"The parents of a girl accept bridal presents from a man after promising to give their daughter in marriage to him. If she, disliking him, runs away, another daughter shall be substituted, failing which all the bridal presents shall be restored. If there has been marriage and if it has been consumated, double the presents shall be restored. (Kàingza)."

Section 73 of the Digest provides that a suitor who marries another woman, should not demand the return of the bridal

---

(166) (1936) 14 Ran. 215 (F.B.)
(167) Digest, Vol. II, secs. 54, 56 and 74.
(168) Digest, Vol. II, secs. 68, 81 and 82.

presents. Section 75 provides that in the case of rival suitors where one has given presents to the parents and the other has had sexual intercourse with the girl, the latter is to marry her and if he does not, he is liable to compensate the parents for what they have had to pay to the other man. According to sections 83 and 88, the bridegroom who repudiates the bride at the time of marriage, is to forfeit the bridal presents and to pay compensation, if the marriage has not been consumated, but if it has been, he is liable also to pay his Kobo. Similarly, the bride who elopes with her paramour should restore to the bridegroom all the presents given by him and pay him all the marriage expenses as well as all her ormaments and wearing apparel (169). If the elopement takes place after consumation of marriage, he is entitled to receive all the property brought by her and her Kobo as adulteress. According to Manugye, the amount of compensation payable by the man with whom the bride elopes is thirty ticals of silver (170). Again in section 142, the seducer is to compensate the parents and in sections 142 and 149, if a man elopes with a woman, because her parents disagree, and subsequently repudiates her, he is to pay her his Kobo. Shaw, J. said, "As a rule the Dhammathats seem to consider that when the suitor fails to carry out his promise, it is sufficient that

---

(169) Digest, Vol. II, sec. 81.
(170) Manugye quoted in Digest, Vol. II, sec. 81.

the girl should be at liberty to marry another, and compensation is awarded only to the suitor when the girl or her parents fail to go through with the matter. But in certain circumstances the suitor is declared to be liable to compensate the girl or her parents" (171). It is nececessary to dilate upon these and similar passages in the Dhammathats as Burmese Buddhist Law is no longer applicable to suits for damages for breach of promise to marry in futuro (~~172~~) nor to actions for seduction, criminal conversation, enticement, or alienation of affection.

Right to claim damages from the parents for breach of their promise to give their child in marriage.

The question whether the breach by the father of his promises to give his son in marriage to a young woman or to make his son marry her and to give the couple marriage-presents suitable to his position in life afford the girl or her parents or both any cause of action on which a Civil Court could make a decree for damages was first raised in Mg. Thein v. Ma Thet Hnin (172). Some texts in Dhammathats (173) contemplate penalties on parents who refuse to carry out a promise to give a child in marriage but these texts apply to parents of a girl only. No similar provisions penalising parents of a boy are to be found. Even if there were any, such provisions

---

(171) Kan Gaung v. Mi Hla Chok, (1907) II U.B.R. (1907-09) Contract 5.
(172) (1915) 8 L.B.R. 347.
(173) Digest, Vol. II, sections, 54, and 66 .

it would not be possible for the Courts in Burma to give effect to them in these days because to do so would infringe the essential principle that consent of parties to a marriage must be free. No boy or girl can be married legally without his or her free consent or against his or her will (174). Hence the breach by a father of his promise to give his son in marriage and to give suitable presents does not afford a cause of action, so an action for damages for the breach of such promise cannot be maintained against the parents of a Burman Buddhist boy (175). For the same reason it may be doubted whether an action for damages for the breach by the parents of their promise to give their daughter would be maintainable against them now-a-days, because they are not the principal parties in a contract to marry. It is submitted that a suit for return of bridal presents or the reasonable value thereof on an engagement being broken off, is still maintainable against the parties who have received them, on ground of failure of consideration. In Ma Ngwe Yin v. Mg. Po Taw (176) the Chief Court of Lower Burma held that on breach of a contract of marriage, the same bridal presents could be recovered. Under s. 73 of the Contract Act, the party who suffers by the breach of the contract to marry is entitled to receive compensation for loss or damages arising naturally from the breach. If

---

(174) Maung Taik v. Ma Cho, (1900) II U.B.R. (1897-01) 197.
(175) Maung Thein v. Ma Thet Hnin, (1915) 8 L.B.R. 347.
Maung Po Thaw v. Maung Tha Hlaing, (1917-20) 3 UBR. 106.
(176) (1914) 23 I.C. 376.

there is a stipulation to pay a specified sum for breach, s. 74 provides that the party at fault is nevertheless only obliged to pay reasonable compensation not exceeding the amount stipulated for. It was contended in Maung Law Phyu v. Ma Baw(177) that double value should have been given as laid down in the Dhammathats (178) if the betrothal is broken off. But it was held that this provision like many others in the Dhammathats is archaic and obsolete, and no longer ought to be followed. In such cases, even if the parents, as here, had promised to return double the value, of the presents, the courts should apply section 74 of the contract Act and grant reasonable compensation, not exceeding the penalty stipulated for.

(v) The Measure of Damages.

It has been pointed out above that an action for damages for breach of a promise lies against the party at fault, irrespective of sex. In Ma Ngwe Yin v. Maung Po Taw (179) the suit for damages brought by the man was dismissed by Parlett, J., on the grounds that there was no evidence of

---

(177) (1933) 11 Ran. 143.

(178) Digest, Vol. II, section 74.
"If a daughter is given in marriage to a man other than the suitor for her hand who has given bridal presents and served in her parents' house, double the presents given by the latter shall be restored to them (Mânussika) If the parents give their daughter in marriage to one man after having accepted bridal presents from another, they shall restore double such presents (Mânussika).

(179) (1914) 7 B.L.T. 14.

actual loss, that there was nothing on the records to indicate that the plaintiff had suffered any injury to his social standing or reputation, and that the mere fact that the man became the butt of his acquaintances' jests or had experienced a feeling of shame, did not constitute any injury for which damages could be awarded.

It is submitted that the reasons given by his Lordship for dismissing the suit were insufficient and that damages should have been awarded. U May Oung said, "The Buddhist Law contemplates that damages should be awarded irrespective of the considerations set out in Ma Ngwe Yin's case, not necessarily as a solatium to the plaintiff but rather in the nature of a penalty on the fickle defendant. An analogy exists in the injuria sine damno provided for in the law of Torts."(180)

It is much easier to assess damage in a suit instituted by a woman. Damages awarded for the breach of promise to marry form an exception to the general rule of damages in an action on breach of contract where such damages are limited to the consequences of the breach alone. In the former case the damages are awarded not by way of punishment but by way of an indemnity to the injured party for the loss she has sustained and embrace compensation for injuries to the feelings, affections, wounded pride as well as for the loss of marriage, and the sentimental damages, such as for the wasted years. (181)

---

(180) Leading Cases on Buddhist Law, 27.
(181) Frost v. Knight, (1872) L.R. 7 Ex. 111; Smith v. Woodfine, (1857) ICBNS 660, 667; A.C.Dutt, The Indian Contract Act, 568.

The damages vary with the wealth of the defendant (182). All these factors are allowed to be reckoned in the assessment of the damages in English Law and the same principle is adopted in Burmese Buddhist Law, as will be seen below.

Thus, it was held in Maung Hmaing v. Ma Pwa Me (183) and Ma Ngwe Naing v. Tun Ya (184) that besides ordinary damages to cover any loss sustained by her through making preparations for the marriage, special damages should also be awarded taking into consideration the social position of the plaintiff as altered by the defendant's conduct towards her, including seduction which may be taken as an aggravating circumstance.

In Maung Yaung Gyi v. Ma Thaw (185) it was held that an action for breach of promise of marriage is one which is based upon the hypothesis of a broken contract, yet is attended with some special consequences of a personal wrong and in which damages may be given of a vindicative and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner; that the wealth and social position of the defendant may be considered as these indicate the loss sustained by the breach of contract, and that seduction is an element to be considered in connection with the measure of damages. It is submitted that the principle for assessing damages laid down in this case is reasonable and accurate.

---

(182) Berry v. Da Costa,(1866) L.R. I.C.P. 331; Millington v. Loring,(1880) 6 Q.B.D. 190.
(183) (1891) S.J. 539. (184) (1920) 13 K.B.L.T. 6.
(185) (1902) 8 B.L.R. 324.

The action to recover damages in a breach of contract of marriage cannot be brought by or against executors or administrators of a deceased promisee or promissor on the principle expressed in maxim 'actio personalis moritur cum persona'. The injury in respect of which damages are given is personal, and with the death of the promisor all claims to damages of a sentimental or exemplary kind ceases.

9. Marriage Brokage Contract.

It was held in Maung Pyo v. Mg. Po Gyi (186) that an agreement to give a reward to another in consideration of his negotiating a marriage with a third person is opposed to public policy, within the meaning of sec. 23 of the Contract Act 1872, and should not, therefore, be enforced.

10. Seduction.

Professor Gledhill said on this subject (187),"seduction, on the other hand had nothing to do with marriage. So the Burmese Law, which might have awarded the compensation and thereby rehabilitated her in public estimation, did not apply." This statement is true because no doubt was ever expressed by the courts that seduction unaccompanied by a promise to marry is not a question regarding marriage within the meaning of section 13 of the Burma Laws Act, 1898, and hence the case

---

(186) (1918) 3 U.B.R. (1917-20) 119.
(187) Burmese Law in the 19th Century, with special reference to the position of women, 30.

must be decided according to justice, equity and good conscience (188). It was accordingly held both in Upper and Lower Burma Courts that where there is no promise to marry, a woman cannot recover damages for seduction resulting in pregnancy (189).

The earliest case on this point was Mi Kin v. Nga Myin Gyi (190) wherein the only foundation for the action was that the plaintiff by her own consent, cohabited with the defendant and so became pregnant. Jardine, J., said, "I fail entirely to see how the alleged pregnancy can be considered as a cause of action. The plaintiff must have known that it was probable result of the cohabitation and must be taken to have consented to it. Besides this an award of damages would encourage immorality." As the Burmese Buddhist Law was inapplicable, the Court dismissed the suit for damages.

It is said by U Tha Gywe (191) that the sentiment of these texts still exist among the people; they think that if a man seduces a girl, even without promising to marry her, he ought to pay damages, unless he makes her his wife. He said further that the texts are still followed by village elders to whom

---

(188) Mi Kin v. Nga Myin Gyi, (1882) S.J. 114;
Ngo Po Thaik v. Mi Hnin Zan, (1883) S.J. 235.

(189) Mi Kin v. Ngo Myin Gyi, (1882) S.J. 114;
Ngo Po Thaik v. Mi Hnin Zan, (1883) S.J. 235;
Ma Yon v. Mg. Po Lu, (1900) II U.B.R. (1897-01) 499;
Mi Hla Waing v. Nga Kan, (1908) II U.B.R. (1907-09) Civ.Pro.1

(190) (1882) S.J. 114.

(191) Conflict of Authority in Buddhist Law, Vol I, 38.

the parties or their families often refer the question of damages for decision in such cases. The real meaning of the Dhammathats is that fornication is a criminal offence, especiall if the woman is under age (192). Jardine, J., said, (193) "So far as the same acts are dealt with in the Indian Penal Code, we must apply it and no other penal law in criminal jurisdiction. Section 366 of the Penal Code protects young girls of all classes. The Criminal Procedure Code gives a remedy when the father neglects to support the child. It is to be presumed that these statutes have dealt with seduction as effectively as the Legislature considered necessary for the general protection of society." It must be remembered also that the question of applying the Dhammathats to such a case can no longer arise in as much as it is now settled law that seduction pure and simple is not 'a question regarding marriage'. (194). But there is nothing immoral in coming to a private arrangement with a girl to pay damages for seduction and refer the question of amount to an arbitration (195).

In Nga Po Thaik v. Mi Hnin Zan (196) it was contended that the woman allowed the man to have sexual intercourse with the knowledge of her mother because the parties had the intention

---

(192) Manugye, Book 6, sections 27 and 28.
(193) Nga Po Thaik v. Mi Hnin Zan, (1883) S.J. 235 at 237.
(194) Mi Kin v. Nga Myin Gyi, (1882) S.J. 114.
(195) Mi Hla Waing v. Nga Kan, (1908) II U.B.R. (1907-09) civ. Pro. 19.
(196) (1883) S.J. 235.

of becoming husband and wife and did, in law, became husband and wife by the effect of the provisions in the Dhammathat, this being one of the three ways of becoming man and wife. The Court, however, held that it would be unnatural to suppose that an implied consent to marry exists wherever sexual intercourse is permitted, and that it would be highly dangerous to admit such a doctrine for it would give an enormous advantage to women of bad character. No court with any respect to morality or public policy can admit that if a mother or other guardian acquiesces in the daughter's intercourse before marriage, the intercourse causes, by mere repitition, the connection of the parties to become a marriage. Such a doctrine would conflict with the theory of inheritance and with the rules about marriage."

Suggested Remedy.

It is unfortunate that the girl herself cannot maintain a suit for damages. There seems to be a tendency on the part of some text writers and judges to hold that a Burman Buddhist girl ought to be allowed to sue for damages (197). But there is no authoritative decision yet to support the said tendency. It may be pointed out that if a village girl or bazaar girl gets compensation from her seducer, she is generally regarded

---

(197) U Tha Gywe, Conflict of Authority, Vol. I, 38; U May Oung, Leading Cases on Buddhist Law, 31; Ma Ngwe Gaing v. Tun Ya, (1920) 13 B.L.T. 6

as an honest woman restored. It is submitted therefore, that it is not easy to accept Jardine, J.'s view (supra) when he said that these statutes (Penal Code and Criminal Procedure Code) have dealt with seduction as effectually as the Legislative considered necessary for the general protection of society.

In English Law an action for seduction lies if the girl is impregnated, but only at the suit of the father. The action is a development of the action to recover damages for the loss of the service of a servant, and cannot succeed unless the father can prove that the daughter did him slight service like making tea. But the damages awarded may be punitive and not restricted to the value of the lost services (198). Blackburn, J. said, (199) "In form the action is by the master, having a right to the services of a servant, and having lost the benefit of these services by reason of the wrongful act of the defendant; but though in form this is the nature of the action, the damages by loss of service is in reality merely nominal; and so long as Lord Ellenborough's time ..... the practice had become enveterate of giving to the parent, or person in loco parentis, damages beyond the mere loss of service in respect of the loss aggravated by the injury to

---

(198) P.M. Bromley, Family Law, 325.
(199) Terry v. Hutchinson, (1868) 3 Q.B.D. 597 at 602.

the person seduced. In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point on which it is founded."

It is submitted, therefore, that the courts in Burma should give the girl a right of action for damages and for this purpose, it does not seem, 'equity, justice and good conscience' require us to introduce into Burmese Law a legal fiction of this kind.

CHAPTER VIII.

GUARDIAN'S CONSENT TO MARRIAGE

1. In the case of the Bride.

The Majority Act, 1875, which fixes the age of majority for most purposes, provides in section 2 that "nothing herein contained shall affect the capacity of any person to act in the following matters, namely, marriage, dower, divorce and adoption". For acts in law not in the excepted categories section 3 makes the age of majority 18 in the normal case, but minority extends until the completion of the 21st year in the case of a person who has a guardian appointed by a Court, or who or whose property is under the jurisdiction of the Courts of Wards. Hence the Dhammathats have to be referred to for the determination of the age of majority for the purpose of marriage. The Dhammathats impose on parents and guardians the necessity of effecting the marriage of a minor before the completion of the sixteenth year to prevent him or her falling into sin. But if the parents or guardians fail to comply with this injunction, it is only when a girl has attained the age of twenty one years that she has a right to contract a valid marriage with the man of her choice without a guardian's consent (1).

Manugye contain this passage (2).

"I will now treat of the woman, who are spoken of in the

---

(1) Ma E Sein v. Mg. Hla Min, (1925) 3 Ran. 458 at 461 (F.B.).
(2) Manugye Book VI, section 28.

commentaries on the sacred books: First, a woman taken care of by her mother; second, one taken care of by her father; third, one by both; fourth, one by her brother; fifth, one by her eldest sister; sixth, one by her relations; seventh, one by her family and eighth a woman protected by religious habits. If carnel knowledge be had of any of these eight classes of woman with their consent, there is no punishment in future state. If the person under whose care they be, shall not give consent, they shall not be claimed as a wife. Why is this? - because their protector is not willing.... As regards the eight women above noted if their protector do not give them in marriage to a proper person, and they shall willingly have connection with a young man, provided they are above twenty years of age, let them have a right to live with the man of their choice. Why is this? - because their protector watched them without regard to their desires".

Similarly, a passage may be quoted from the Râjabala which runs as follows (3) :

"After her attaining the age of twenty years a woman may marry a man of her choice although her guardians may not approve of the marriage". The reason is that her guardians did not give her in marriage when she arrived at the marriageable age."

Robinson, C.J., said, (4) "Having regard to these

---

(3) ~~Chapter VI. of~~ section 33, Kinwun Mingi's Digest, Volume II. ~~Section. 126.~~

(4) Ma E Sein v. Mg Hla Min, (1925) 3 Ran. 455 at 461 (F.B.).

provisions and having regard to the position accorded to parents and guardians with reference to control over the children, especially in the matter of their marriage, there can, in my opinion, be no doubt that no minor girl under the age of twenty years of age can contract a valid marriage without the consent or against the will of her parents or guardians, or of the relation under whose protection she is living."

Up to the age of twenty years a girl can only be married with the consent of her parents or guardians as well as that of her own. There can evidently be no valid marriage with a girl under sixteen years of age without her parent's or guardian's consent though she may be a consenting party. Elopement with a girl under sixteen years of age exposes her seducer to a criminal prosecution under section 366, Indian Penal Code (Kidnapping or abducting a woman with intent that she should be seduced) and Jardine J., relieddon Manugye Book VI, section 21, 22 and 23, and the Wunnana, sections 133 and 134 as authorities (5).

Once, however, a minor girl has been married she becomes emancipated from parental control (6), and it would appear, therefore, that a woman under the age of twenty years may, if a

---

(5) Q.E. v. Nga Ne U, (1883) S.J. 202;
Chan Toon's Buddhist Law 28 - 29;
Sections 21,22,23 of Manugye, Book VI, provide the case where parents are empowered to cause the separation of their daughter from a husband who took her without their consent.

(6) Mg.Myat Tha v. Ma Thon, (1893) II U.B.R.(1892-6) 200;
Ma E Sein v. Mg. Hla Min, (1925) 3 Ran. 455(F.B.)

widow, or if she has been a party to a marriage which has been dissolved, marry again without first obtaining the consent of her parents or guardians.

Manugye Dhammathats contain the following passage (7).

"A young woman who has never had a husband has no right to take one without the consent of her parents or guardians; but if she be a widow, or divorced from her husband, and she marry the man of her choice, her parents, guardians, or relatives have no right to interfere to prevent it; let the woman who has already had a husband take the man of her choice". There is nothing in this text imposing any limit on its applicability on grounds of infancy.

Manugye (8) also allows a young woman to contract a valid marriage without the consent of her parents, even when she is under age, by eloping three times, the reason given, being that the parents are unable to control her.

"In cases where a young woman has been returned three times no action will be against the young man or his parents. Why is this? - because the 'Owners' of the daughter could not control her".

Sir John Jardine, in his notes on Buddhist Law said, "I would hazard an opinion that the procedure by elopement may, in

---

(7) Book VI, Section 30.
(8) Book VI, Section 23.

the old society have been the best way of allowing the girl to exhibit a deliberate choice, there being no general use of Courts or writings, and less regard for chastity than now. It is important to notice that such choice was allowed in an age when many of the wives were really owned, i.e. were slaves. It is difficult to control such a procedure in the present time; but if the Courts shut up the relief by elopement, they must either allow some other means of expressing deliberate intention, or leave the girl in a worse position than girls enjoyed in a more barbarious age", (9). It was said by Adamson, J., in King Emperor v. Nga Ni Ta, that the provision of the Dhammathats as regards these three elopement is obsolete and would not receive countenance at the present day (10).

2. In the case of the Bridegroom.

Manugye says that if a young man and a young woman have clandestine inter-course the parents of the former are not at liberty to withold their consent to their marriage (11). From this it seems at the first sight that the consent of the parents of a young man is a necessity for the validity of his marriage. But this rule of Manugye is more of a moral precept than a positive rule of law, (12). Though the Dhammathats

---

(9) Jardine's notes on Buddhist Law, Page 4,5. Part I f.21.
(10) King Emperor v.Nga Ni Ta (1903)I U.B.R.(1902-3)Penal Code 15
(11) Digest, volume II section 149.
(12) S.C.Lahiri, Burmese Buddhist Law, 29.

formed the marriage of a girl below twenty without the consent of her parents, there is no corresponding rule applicable to a boy. It would appear that a young man may contract a valid marriage at any age provided, of course, that he is physically competent to enter the married state.

In 1918, the Judicial commissioner's Court of Upper Burma expressed the following view (13):

"The Dhammathats say in so many words that children should be married as soon as they are of age to marry, and the inference in my opinion should be drawn from their omission to prescribe a limit of age below which a youth of marriageable age cannot marry without his parents consent is that there is practically no such limit. If a girl is released from parental control in matters of marriage, at the age of twenty, it seems reasonable to suppose that a youth who is ordinarily much less under control should be released much earlier, and there can be no doubt that as a matter of fact Burmese Buddhist boys who are of age to marry do habitually marry the girl of their choices without any regard to their parents wishes. I find therefore that there is nothing in Burmese Buddhist Law to prevent a youth from contracting a valid marriage without his parents consent at any time after he is physically competent for marriage".

There is, however, a somewhat obscure passage in Manugye,

---

(13) Mg. Nyein v. Ma Myin, (1918) 3 U.B.R. 75.

(14), which describes the law applicable when a young man and woman indulge in clandestine intercourse.

"If they be of the same family and consenting, let them become man and wife. If the woman's parents do not approve of the man, let them have the right to cause their separation. If the parents of the man object to the match, they shall have no such right. If he himself does not like the woman, let him pay the price of his body. If the woman does not like the man, let him not pay; there is no blame".

This passage is referred to in Kinwun Mingye's Digest volume II, section 149. On this tenuous basis, the Chief Court of Lower Burma in 1919, after considering the reasoning of the Judicial Commission of Upper Burma in Mg. Nyein's case (supra) dissented from it and ruled that a Burmese Buddhist minor youth under twenty years of age could not contract a valid marriage without the consent of his parents unless he was steadfastly determined to marry the girl of his choice (15). This decision in fact fastened on a youth under twenty, the same disability as that imposed on a maiden under twenty by a specific injunction in a text. There was no authority for this proposition; it was really judge made law, and in 1925 the matter was taken up again by the Rangoon High Court which held

---

(14) Manugye Book VI section 28; Digest Volume II, section 149.
(15) Tun Kyin v. Ma Mai Tin, (1918) 10 L.B.R. 28.

that a Burmese Buddhist youth of over sixteen years of age could contract a valid marriage, (16). In 1928, approving the Upper Burma view, the Rangoon High Court declared that a Burmese Buddhist youth is competent to contract a valid marriage at any time after he is physically competent ~~to~~ for marriage; consent of his parent or guardian is not necessary (17). It is submitted that this view is correct and in accordance with the Dhammathats.

3. Statutory restrictions on the marriage of Infants.

Although the Dhammathats lay down no minimum age for marriage, the Penal Code (18) makes sexual intercourse by a man with his wife under the age of thirteen years punishable with imprisonment or fine or both; this is a fairly effective deterrent on marriage with a female under thirteen, even with the consent of her parents or guardians. It is also to be noted that the child Marriage Restraint Act (XIX of 1929) imposes restraints on the solemnisation of child marriages i.e. marriages to which a male under eighteen or a female under fourteen is a party. No man above the age of eighteen years can marry a female under fourteen years of age without incurring criminal liability. Moreover, any person who performs, conducts, or directs any child marriage is punishable with imprisonment or

---

(16) Ma E Sein v. Mg. Hla Min, (1925) 4 B.L.J. 250.
(17) Mg.Thein v. Ma Saw, (1928) 6 Ran. 340.
(18) Section 375. Penal Code.

fine, or with both, unless he proves that he had no reason to believe that the marriage was a child marriage. Under section 6, where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian defacto or defure, who promotes such marriages, or allows it to be solemnized, is likewise punishable; and until the contrary is proved, the person having charge of such minor at the time the child marriage was solemnized will be presumed to have negligently failed to prevent its solemnization.

However, it seems clear that the act will apply to a marriage to which one or both of the contracting parties has been previously married. No Court can take coginizance of a case under this act except upon a complaint made within one year from the date of solemnization of the marriage complained of. There has been no reported case of prosecution under this Act although it has been in force since 1929, but it does not follow that the Act holds out its threats of punishment in vain.

Notwithstanding that a marriage in contravention of the Act curtails penalties for the bridegroom, if sui juris, for the guardians and promotors, the marriage itself is neither void nor voidable. By contrast a marriage in England, to which one party is under sixteen is void.

4. Guardians for Marriage.

Natural Guardians

Manugye gives, in order, a list of persons who can validly give away a girl under twenty in marriage. They are: the

father, the mother, brother, sister, guardians and relations (19). Sir John Jardine, in his notes on Buddhist Law (20) listed as follows, in order of preference; "while the father is alive, he alone can dispose of her; failing him, the mother; and failing both parents, the brothers and sisters. If there are no such near relations, other relations have apparently a similar right if the girl is actually under their care and protection, i.e. grandfather, grandmother, maternal aunts and uncles, and paternal uncles and aunts. The Governor or head of the town is also mentioned as a protector. The Dhammathats (Manugye) does not specify which of these more distant relations is entitled to priority of guardianships; but its meaning, as expressed in section 28, appears to be that the persons actually taking care of the girl have a right to control her marriage; and it might be argued that the guardian appointed by the Civil Court under Act XL of 1858 would have the same right as he is saddled with as much responsibility as the Governor or Head of a town".

5. Guardians and Wards Act 1890.

Under section 7 of this Court, a guardian of the person of a minor may be appointed by the Court if it is satisfied that it is for the welfare of a minor. In considering what will be for the welfare of the minor, the court shall have regard to the age

---

(19) Manugye, Book VI, section 28;
Digest II, sections 26, 71.
(20) Sir John Jardine, notes on Buddhist Law, notes II, paragraph 12.

and sex of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property (21). In the absence of any suitable friends or relatives who desire to be appointed as guardians of the minor, the Deputy Commissioner of the district in which the minor ordinarily resides may be appointed by the Court. When there is a dispute upon the question affecting the wards welfare between the guardians when there are more than one, and possibly between the guardian and the ward, the Court may on the application of any person interested, or any one of the guardians, or of its own motion, make such orders as it may deem fit to regulate their conduct (22).

The authority of such guardian ceases when the ward attains the age of twenty one years, or on the marriage of the female ward, even though she may not have attained the age of twenty one years at the time of her marriage, unless her husband, in the opinion of the Court is totally unfit to be the guardian of her person (23).

The duties of a Guardian charged with the custody of the ward are to look to the latter's support, health and education,

---

(21) Section 17, Guardians and Wards Act 1890.
(22) Section 43, " " " " "
(23) Section 41, " " " " "

and such other matters as the law to which the ward is subject requires (24). It is obvious that 'such other matters as the law to which the ward is subject requires' cover marriage and therefore such guardian can consent to the marriage of his ward, where consent is necessary.

State Officials as Guardians.

According to the texts, the Governors and magistrates, acting as guardians, could give girls in marriage in olden days (25), but there is no record of this ever being done, so presumably the practise is obsolete.

"If a daughter is given in marriage to a man by the mother, elder sister, brother, grandparents, maternal aunts, paternal uncles, mother's elder brother, father's elder sister, governors or magistrates, the father shall have the right to revoke the marriage, if he does not approve of it, and marry her to another man.

6. Delegation of Parental Authority.

The Dhammathats (26) recognised delegation of parental power including the right to give a minor girl in marriage, to their relations, when by reason of old age, disease, or infirmity, the parents were incapable of exercising it personally.

---

(24) Section 24. Guardians and Wards Act 1890.
(25) Digest volume II, Section 71.
(26) " " II, " 70.

"The parents or grandparents being unable themselves to the care of their co-heirs; the latter shall have the right to give away in marriage the children or grandchildren so entrusted and to accept the presents given at the time of their betrothal. The parents shall not subsequently question such right (27)." Kaingza goes further and says that it is permissible to delegate such authority to a neighbour not relation of the parents (28).

7. Who can give Consent?

Where both parents are alive the father has the prior right to give his daughter in marriage, and he might revoke the marriage contracted with the mother's consent in his absence if he disapproves of the match (29). The decision in the following case cited in the Mânussika Dhammathat illustrates that the father's right to give away his daughter in marriage is superior to that of the mother's (30).

"A trader whose boat was capsized and who was thereby rendered helpless asked a fisherman to rescue him, promising that he would give his daughter in marriage. He was rescued from a watery grave by the fisherman, and in pursuance of his promise he took home the fisherman with him. On his arrival he found that his daughter had already been given away in marriage by her mother. Both parents disputed each other's right of control over their children, and went before Manu, the Rishi.

---

(27) Manu-Vannâna - Digest Volume II, section 70.
(28) Digest, II, section 70.
(29) Kinwun Mingyi, Digest Volume II, section 69.
(30)(27) Manu-Vannâna - Digest Volume II, section 70
(28) Digest, II, section 70.

He said that as the mother was like the soil on which crops were raised and the father like the tiller of the soil who raised the crops, so the latter should have absolute control over the children.

The following case was decided in accordance with the above rule. In the reign of Narapati, builder of the Tupayon pagoda, the father of a girl desired to give her in marriage to his nephew, while her mother wanted her for her nephew. Both parents came before the King for the settlement of their contention. The King considered that as a son properly belonged to the father and a daughter to the mother, the latter should be favoured. But the king's councillors said that when King Vessantarà, the Embryo Buddha, gave away in charity his wife and children, it must be presumed that he had complete control over them, and that, considering that fact, a man should be deemed to have control even over his wife, leave alone his daughter. The king accordingly decided in favour of the father and the nats applauded the decision" (31).

The rule in the other texts is also to the same effect, "Marriage with a son or daughter is valid only when heorrshe is given in marriage by the father" (32) because "the husband is

---

(31) Digest II, Section 69.
(32) Waru & Warulinga, Digest II, 69.

the lord and master of his wife and children even though she be the daughter of a king. The man or the king who is governed by his wife or chief queen is sure to be ruined (33)". Another reason for submission to the husband's authority declared in the Dhammathats is given in the Manu-Vannanâ.

"All dealings of the wife with other persons in worldly matters without the knowledge and consent of her husband cannot be held to be proper". It may be compared to Manu-Vannanâ (34). "If the mother gives the daughter in marriage during the absence of the daughter's father, and if the father on his return does not agree to it, he has a right to take that daughter back. In secular affairs (ဓမ္မသတ်) the husband alone has the governance of sons and daughters. Even if there be a king's daughter, the husband alone has authority over the wife, together with sons and daughters; therefore it is not right to act in secular affairs without the husband's knowledge. Even if she be a chief queen she has no authority".

Section 117 of Thara Shwe Myin also shows the parental authority and the superior rights of the father over the mother to give a daughter in marriage. The same idea appears in the Manugye (35).

---

(33) Kaingza, Râsi, Kandaw, Manu, & Vannadhamma.
(34) Section 133 Manu Vannanâ;
JJardine, Notes on Buddhist Law. Note III, Page 12.
(35) Manugye Book VI, section 28.

"Let him only to whom she is given by her father, be her husband. If the father be dead, let him only to whom she is given by her mother be her husband".

The rule laid down in the Kungyalinga is that if a married man publicly co-habits with a woman and maintains her with the knowledge of her mother and if her father does not know of the co-habitation, he can excercise his right as a father who completely controls her and take her back as in the case of an owner recovering his property given away stealthily by one who has no title to it. But the man shall not be liable to pay compensation apparently because the mother consents to the intercourse (36).

It may be inferred from the above texts that the Law looks on a daughter as being as much the right and property of the father as his own wearing apparel or other goods. He can even sell his children in case of necessity, and if the parents become too poor to support themselves, filial piety would induce the children to sell themselves in order to provide the means (37) because the parents are owners of their children,

---

(36) Digest Volume II, section 69.
(37) Vunnanâ section 35 and 170.

(38) and the latter are regarded as beings owned by the former and liable to be sold. The precepts of the Dhammathats were almost universally followed in Upper Burma before the annexation, when parents in straitened circumstances used to sell their children who eventually became hereditary slaves. But since the abolition of slavery under the British regime this barbarous practice has happily died out altogether, and the law which authorises a parent to sell his or her child has now become a dead letter, so that the parental authority declared in the Dhammathats is true only in a limited sense (39). It may be concluded that the father has the superior right over the mother to give a daughter in marriage.

---

(38) Manugye Book 12, section 3;

"If the females are left with the father, and he sells them, let him give one-half of their price to their mother. If the mother be dead, and the father being in want shall sell all the daughters, no one shall have the right to prevent ~~him~~ him; and if the father be dead, and the mother from want shall sell the sons, no one shall have a right to interfere. Why is this? - because the parents are the owners of their children. It is further said, if the father take a second wife or the wife a second husband and the father sells the sons, the mother shall have no right to interfere; or if the mother shall sell the daughters, the father shall have no right to interfere. If after the father has taken a second wife, or the mother a second husband, the mother shall sell the sons, or the father the daughters, let the whole price of the sons be given to the father, and the whole price of the daughters to the mother. This is said when the father or mother has taken a second wife or husband, and sells the children from some other cause (than want). When the son is living with his father or mother, and a stepmother or stepfather, they have no right to sell him for any portion of a debt, which has been contracted by the stepmother or stepfather; let the father or mother to whom it belongs pay it". (39) U Tha Gywe, A Treatise on Buddhist Law, volume 1, section 8.

If the father is dead, the mother's consent is sufficient. The father's consent is not necessary when the children are illegitimate, unless he has actual custody. The position is also the same even under the Guardian and Wards Act 1890. Fox C.J., in Ma Myo and Ma Yon v. Maung Kyan (40), said, "It is anomalous that the legislature is most careful not to interfere with such laws, and in other parts of the Guardians and Wards Act itself, e.g. section 15, care is taken to have the personal law of a minor applied. Both Hindu and Mohammedan Law provide for the right to the guardianship of illegitimate children. Under the former, a Hindu father has not, as against the mother, any right to the guardianship of his illegitimate offspring. The Mohammedan law does not recognize the right of a putative father to the guardianship of the person or property". He further said, "the word father in clause (b) of section 19 can only apply in the case of a child born in wedlock in view of the other construction involving an interference with the laws of the peoples of India which could not have been intended". Under Burmese Buddhist Law where the parents are divorced and the child upon attaining the age of discretion chooses to live with the mother, the father loses his control over it, and where the mother has remarried, the stepfather, if he has its custody,

---

(40) Ma Myo and Ma Yon v. Mg.Kyan,(1915) 8 L.B.R.415 at 417.

will be preferred to the natural father for its guardianship (41). Fox, C.J. and Parlett,J., gave the following reasons:-
(1) A father may lose his right to the guardianship of his children when he has permitted another man to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their education.
(2) Under Burmese Buddhist Law where, after a divorce, the children on reaching years of discretion live entirely with one of the parents, they lose their right to inherit from the other parents, and if the latter acquiesces in the arrangement, he forfeits his right to claim the custody of the children while still minors: and
(3) Such children being nearly in the position of children adopted into the family of the parent with whom they live, a principle similar to that of Hindu Law will apply whereby the adoptive father acquires a right of guardianship even against the natural father.

It is submitted that in such cases the stepfather is competent to give the daughter below twenty years to marriage. It is submitted that in the case of an illegitimate daughter under twenty years of age and living with her mother, the latter's consent and not that of the father is necessary to approve her marriage. The consent of the father is also

---

(41) Po Cho v. Ma Nyein Myat & others, (1909) 5 L.B.R. 133.

unnecessary when the minor daughter is given away by her parents in adoption to others or when she lived with her mother after the divorce of the parents.

8. Consent may be Express or Implied.

The consent of the parents or guardians required by the Dhammathats, as laid down in Ma E Sein v. Mg. Hla Min, (42), may be either express or implied. It may be given either before or after the elopement of a young couple. It may be noted in this connection that when a young man elopes with a girl they can be legally united subsequently with the parent's consent, which is generally, if not invariably, given in order to avoid disgrace. This form of marriage is recognised by the Dhammathats (43), and this method is generally adopted when the parents of the man or the girl or of both, do not approve of the proposed marriage. The notification after the elopement has the same effect as previous consent. It seems, the consent of parents or guardians must be free. If it can be shown that such consent was obtained by use of force or fraud, the marriage may be annulled. If the marriage is performed by the young couples despite the refusal of parents and guardians, it is performed

---

(42) Ma E Sein v. Mg. Hla Min, (1925) 3 Ran. 455 (F.B.).
(43) Digest volume II, section 178;
"A son is born after an elopement, subsequently with the parent's consent, the parties are formally wedded. The rule of partition between the son before wedlock and the children born after it is as follows:.....

either by force or by fraud or by his acquiescence, It is submitted that an insane parent or guardian can not give free consent and he or she must be regarded as already dead for the purpose of marriage, and the consent of other relatives may be obtained.

Implied Consent.

The Dhammathats lay down the circumstances from which consent may be implied. According to the Digest (44), a girl's parents should grant permission when the parties are in love, if they wish to avoid scandal, and the Kungyalinga text cited in that section lays down that if they connive at sexual intercourse, this amounts to giving of the daughter in marriage.

"If the parents connive at the intimacy between their daughter and her lover, the connivance amounts to giving of the daughter in marriage, and they shall not subsequently refuse to recognize the union".

According to Manugye, where a young man while working for the parents of a minor girl, had carnal knowledge with her, with their knowledge and her own consent, they should not dispute that the couple had attained marriage (45).

"In case no engagement was made, should a young man whilst working diligently for the parents, with their knowledge and her own consent, slept with the daughter in her own room, and

---

(44) Digest volume II, section 50.
(45) Manugye volume VI, section 20.

have connection with her, the parents shall not afterwards say they did not give her to him: they were aware that they had slept together, and that he was working and eating in the same house; let them be considered as man and wife".

Likewise, where a couple after the elopement returned to the village of her parents, or stayed in a neighbouring village openly for some years, the girls parent should not cause their separation (46).

"After elopement the young couple settle down in the same village in which the girl's parents live on in its neighbourhood; the parents are not entitled to separate their daughter from the man with whom she eloped, if five or ten years have elapsed after her settlement near them with their knowledge, or if she has given birth to two or three children after such settlement". (Manugye) So also, where the parents knowingly permitted their minor daughter to have clandestine intercourse with a man for days and months, the consent of parents and guardians should be implied (47). The question is briefly discussed in Kan Gaung v. Mi Hla Ghok (48), where the appellant eloped with a minor girl, and did not ask for the mother's consent till after the elopement, when for the first time the latter is shown to have consented to the proposed marriage. It

---

(46) See Digest volume II, section 146.
(47) Digest volume II, section 99.
(48) Kan Gaung v. Mi Hla Ghok (1907) 2 U.B.R. Con. 5.

appears from the evidence on the record that the mother connived at the intimacy before the elopement, and this may be taken as consent binding upon her. But the point, though discussed, was not decided, as it was not essential to the decision of the case, which was a suit for damages for breach of promise of marriage. In Maung Chit Pe v. Ma Tin, (49), a minor girl eloped and subsequently returned to the parent's village and lived with her man openly and to the knowledge of her parents or guardians and they did not reclaim her. Robinson J., held that in such cases consent is to be implied from the conduct of the parents or guardians, and consent though subsequently given or implied would convert the elopement into a valid marriage with effect from the time of elopement.

But the above rule does not apply to the case of a Rahan who has sexual intercourse with a woman. If the parents give her in marriage to another the monk has no right to claim to her as his wife, because the rules of the Order do not permit of his taking a wife among other things (50).

"A rahan is intimate with a girl who is under the protection of her parents who do not connive at the intimacy though cognizant of it. If they give her in marriage to another man the rahan shall have no right to claim her as his wife. Because the rules of the Order do not permit a rahan to take a

---

(49) Mg. Chit Pe v. Ma Tin, (1909) 8 Indian cases 437.
(50)Digest volume II, section 152.

wife, or to own a slave, or to borrow or lend money", (Kyannet).

It may be noticed that the rule laid down in the Dhammathats differentiates between two cases (51). In one the connivance of both the parents is considered necessary and in the other, that of one of the parents is sufficient for the application of the rule. But the majority of the Dhammathats are in favour of the former rule, and there are only now texts (Vinicchaya and Pakàsani) in favour of the latter. But in any case the connivance of the mother alone (if the father is alive), will not be a legal bar to their giving her in marriage to any other man (Pakâsani). In other words the connivance of both the parents or the father only is considered sufficient to validate the union, and the young man might insist on keeping the girl, the cohabitation with her parents consent being presumed to be a marriage (52).

9. Marriage contracted with minor without Parent's consent.

It may be asked whether a spinster under twenty years of age can contract a valid marriage without the consent of her parents or guardians?

The special Court, relying on sections 21, 22 and 23, Manugye, Book VI and sections 133-134, Vannawheld that there could be no valid marriage with a minor girl (even though she

---

(51) Digest volume II, section 99.
(52) U Tha Gywe, A Treatise on Buddhist Law volume I, 25; Manugye Book 6, chapter 20.

herself might have consented) without the consent of her father who was her guardian, and that sexual intercourse which may have taken place between the accused and the minor girl would be 'illicit' within the meaning of section 366 (53), Indian Penal Code, whether he intended to go through a form of marriage with the girl before having intercourse with her or not, for he must have known that such method would form no legal marriage (54).

This ruling of the special Court was, however, overruled in the lower Burma Full Bench case of Crown v. Chan Mya, (55) but followed in K.E. v. Nga Ni Ta, (56) and K.E. v. Po Saw, (57) and distinguished in Nga Ku v. Q.E, (58). In the Full Bench case Crown v. Chan Mya, (59) Irwin J. held that a Burman Buddhist minor girl can in some circumstances contract a valid marriage without the consent of her guardian. Irwin J. observed, "sections 21, 22 and 23 must be read together, and the true interpretation seems to be that a test of the real intention of the parties is necessary, and that if the girl is steadfastly determined to marry her lover, and he continues to be of the same mind, the rights of the guardians must give way before

---

(53) See 366 punishes the taking of a girl under 16 from lawful guardianship in order that she may be seduced to illicit intercourse.
(54) Q.E. v. Nga Ne U, (1883) S.J. 202.
(55) Crown v. Chan Mya, (1902) I L.B.R. 297.
(56) K.E. v. Nga Nita, (1902) I U.B.R. (1902-3) 25 (Penal Code) 15.
(57) K.E. v. Po Saw, (1901) 1 U.B.R. (1897-1901) 328.
(58) Nga Ku v. Q.E, (1901) 1 U.B.R. (1897-1901) 330.
(59) Crown v. Chan Mya, (1902) 1 L.B.R. 297.

accomplished facts". He further held that (ii) if such a girl under sixteen years of age elope with a lover of her own free will intending to cohabit with him, the resulting sexual intercourse is not necessary illicit, and (iii) section 366 Indian Penal Code does not apply to a case in which a minor girl at the time of kidnapping from lawful guardianship intends to cohabit of her own free will with the kidnapper". Fox,J., merely concurred; but Thirkell White, C.J., while concurring in the third proposition, declined to express an opinion on the first and second question. He said that the question had not been fully argued, and that he would not like to commit himself to an opinion on these important questions of Buddhist Law without hearing arguments on both sides and without full examination of all the texts bearing on the points.

This view was dissented from in the Upper Burma case of King Emperor v. Nga Ni Ta,(60), where Adamson J.C. said "It appears to be the opinion of two of the Hohble. Judges of the chief Court that the test is the real intention of the parties, and that if the intention is to marry, the marriage is an accomplished fact from the date of elopement. I cannot but think that this interpretation of the law would appear to be rather startling to Buddhist parents, and I doubt whether any would be found who would admit it. If when a minor Burmese girl eloped with her lover and the parents went to claim her, the

---

(60) King Emperor v. Nga Ni Ta,(1902)I U.B.R.(1902-3) 15.(Panhal Sold 15

lover said, "we eloped with the intention of marriage, and therefore our marriage is an accomplished fact, and you have no longer any right to take upon daughter back;" I fancy that the argument would not command much attention". The learned Judicial Commissioner observed that "in view of the opinion of so able an authority as Chan Toon# it was doubtful whether a marriage by this method would receive countenance at the present day".

In K.E. v. Nga Ni Ta (61) Irwin,J.C. adhered to the view previously expressed by him in Chan Mya's case. In Maung Chit Pe v. Ma Tin,(62), dealing with the question whether consent of parents is essential to the validity of the marriage of a minor who elopes, Robinson J., doubted the correctness of the decision in Chan Mya's case. Thus the point remained unsettled for some years.

Doubts were cast on the correctness of the decision in Chan Mya's case on two subsequent occassions. On the initiative of Maung Ba,J., in Ma E Sein v. Mg.Hla Min, (63) the question whether a girl under twenty years, who is not a widow or a divorcee, can contract a valid marriage without the consent, express or implied, of the parents on guardians was referred to a full bench. Robinson,C.J., reviewed the decision referred to

---

(61) K.E. v. Nga Nita,(1903)I U.B.R.(1902-3)Penal Code 15.
(62) Mg.Chit Pe v. Ma Tin,(1900) 3. B.L.T.43.
(63) Ma E Sein v. Mg.Hla Min, (1925) 3 Rgn.455 (F.B.).

above and answered the issue in the negative after referring to section 33 of the Kinwun Mingyi's Digest, volume II and section 28 of volume VI of the Manugye. The Chief Justice said, "there is no doubt that the Dhammathats contain a large number of texts relating to the rights and duties of parents and guardians and that the control they exercise over minors is a distinct and marked features of Burmese Buddhist Law; and to hold that a minor girl could, by the exercise of her unguided impulse by running away with her lover, absolutely set at nought and take no account of the control of her parents or guardians, is entirely contrary to very prominent provisions of Burmese Law..... The Dhammathats no doubt enjoin upon parents and guardians the necessity to marry minors at the age of fifteen or sixteen so as to prevent their falling into sin, but they expressly, as it seems to me, maintain the position that even though parents or guardians do not pay any regard to the rule enjoined upon them, it is only when the girl has a right to contract a valid marriage without their consent". After discussing the texts in the Dhammathats, he continued: "having regard to those provisions, and having regard to the provisions accorded to parents and guardians with reference to control over the children, especially in the matter of their marriage, there can, in my opinion, be no doubt that no minor girl under the age of twenty can contract a valid marriage without the consent of against the will of her parents or guardians, or of the

relations under whose protection she is living (64)." He then considered the provision of sections 21 and 22 of Volume VII of the Manugye and finally concluded that the consent of the parents or guardians may be either express or implied from their conduct, and that "although there was no valid marriage to start with, the connection may be converted into a valid marriage" with effect from the date of their elopement by such consent given to it afterwards. Brown and Maung Gyi JJ., merely concurred. U May Oung the author of "Leading cases in Buddhist Law," had said "a perusal of these texts, devoid of contradictions, leaves no room for doubt that the consent of parents or guardians is essential to the validity of a marriage with a minor girl, and this being also the case under other systems of law, it is submitted that it should now be declared authoratively for Burmese Buddhists, (65).

It would seem that the judges were considerably influenced by the views of U May Oung. With great respect to the Judges who decided Ma E Sein's case, it is submitted that where a minor girl elopes with her lover, without her parent's or guardian's consent, it is incorrect to say that there was 'no valid marriage to start with'. If that were true, no status of marriage could subsist between the parties until the union

---

(64) Ma E Sein v. Mg.Hla Min, (1925)3 Ran.455, at 463 (F.B.).
(65) Leading cases on Buddhist Law, 9.

~~became~~ were subsequently ratified by her parents subsequently consenting either expressly or by implication. It is submitted that the said decision purports to create an intermediate stage between marriage and clandestine union. It may be pointed out that this view does not receive the support of the texts from Dhammathats. It is necessary at first to consider the texts relied upon by the Lord Chief Justice in Ma E Sein's case.

The text from the Râjabala cited in the Digest (66) runs as follows:

"After her attaining the age of twenty years, a woman may marry a man of her choice although her guardians may not approve of the marriage. The reason is that her guardians did not give her in marriage when she arrived at a marriageable age".

This passage in no authority for the proposition that if a woman under the age of twenty years married a man of her choice without her parent's or guardian's consent, no status of marriage was created between them. All the text says is that a woman over twenty years of age is free to marry anyone she chooses; it meant no more.

But it is submitted that section 28 of volume VI of the Manugye was not accurately translated by Richardson. The relevant portions are as follows:-

---

(66) Digest, volume II section 33.

"I will now treat of the women, who are spoken of in the commentaires on the sacred books:- first, a woman taken care of by her mother; second, one taken care of by her father; third one by both; fourth, one by her brother; fifth, one by her elder sister; sixth, one by her relations; seventh, one by her family; eighth, a woman protected by her religious habits. If carnal knowledge be had of any of these eight classes of women with their consent, there is no punishment in a future state. If the person under whose care they be, shall not give consent, they shall not be claimed as a wife. Why is this? - because their protector is not willing. If connection he had with a woman who has a protector, the concubine of a chief, or any woman for transgressing with whom a penalty is laid down, the pains of hell will be incurred, and the transgressor shall not be let off the compensation on the ground of their being consenting. Why is this? - because there is a protector. As regards the eight women above noted, if their protector do not give them in marriage to a proper person, and they shall willingly have connection with a young man, provided they are above twenty years of age, let them have a right to live with the man of their choice. Why is this?-because their protector watched them without regard to their desires".

The above protion should have translated thus:

"I will now treat of the women who are spoken of in the commentaires on the sacred books; first, a woman taken care of

by her mother; second, one taken care of by her father; third, one taken care of by both parents; fourth, one taken care of by her brother; fifth, one taken care of by her elder sister; sixth, one taken care of by her relations; seventh, one taken care of by her sect; eighth, one taken care of by her friends of similar religious habits. To have carnal knowledge with these eight women if they consent, is not a (sexual) sin, and (the men) will not be consigned to hell. If the guardians do not consent, (the women) cannot say they will marry; (the men) cannot say they willmake them wives,(67). Why is this? - because, the guardians do not permit. A woman who has a protector, a woman serving a term of imprisonment awarded by the King or his officers; to have carnal knowledge with these two is sinful, and (the transgressor) cannot be exempted from payment of compensation on the ground that they consent to it. Why is this? - because, there is some one who has intended to marry, to guard and to communicate with them, (68). As regards eight women above-noted, if their guardians and protectors fail to

---

(67) ဤသို့ခြင်းငယ်တို့ကို ငယ်သားတို့က ခွင့်မပြုလျှင် ဤသူတို့သည် ကာမဂုဏ်ကို ခံစားခြင်းငှာ ကတိမပြုရကုန်ငြားအံ့၊ ထိုသို့ကတိမပြုရကုန်သောကြောင့် အဘယ်သို့ဟူမူ၊ ဘုရားသခင်ကြီးမြတ်သော ဘုရင်ကြီးတို့ကို ကြောက်ရွံ့ခြင်းငှာ ဖြစ်၏။ ဘုရင်ကြီးတို့ကို ကြောက်ရွံ့ခြင်းငှာ ဖြစ်သည်ကား အဘယ်သို့ဟူမူ၊ ဘုရင်ကြီးတို့သည် ခွင့်မပြုကြသောကြောင့်တည်း။ ခွင့်ပြုသူရှိသော မိန်းမ၊ ဘုရင်ကြီးနှင့် တရားသူကြီးတို့ အပြစ်ပေးအပ်သော ထောင်ကျသူမိန်းမ၊ ဤမိန်းမနှစ်ယောက်တို့နှင့် ကာမဂုဏ်ကို ခံစားခြင်းသည် အပြစ်ရှိ၏။ ထိုသူသည် ခွင့်ပြုသောကြောင့် ဒဏ်ကြေးမှ လွတ်ခြင်းငှာ မထိုက်ကုန်။ အဘယ်သို့ဟူမူ၊ ဒဏ်ကြေးကို ပေးဆောင်ရမည်ဟူသော အကြောင်းရှိသောကြောင့်တည်း။

(68) အထက်ဆိုအပ်သော ရှစ်ယောက်သော မိန်းမတို့အား ဘုရားသခင်ကြီးမြတ်သော ဘုရင်ကြီးတို့ကို ကြောက်ရွံ့ခြင်းငှာ ဖြစ်သည်ကား အဘယ်သို့ဟူမူ၊ ဤမိန်းမတို့ကို ကာကွယ်ရန်၊ ပေးဆောင်ရန်၊ ဆက်ဆံရန် ကတိပြုသူရှိသ

give them in marriage to suitable (persons) and in consequence, they have carnal knowledge with young men (of their choice by mutual consent, let them have a right to live together if the women are above twenty years of age, and they wish to do so. Why is this? - because, the guardians and protectors do not guard the women's sense of ~~touch~~ touch; they only guard her person". (69).

It will be seen from the above translations that the classification of women was made without reference to age. Again; 'if the guardians do not consent, (the women) cannot say they will marry; (the men) cannot say they will make them wives' also have no reference to minority. It simply said that a woman over twenty years of age, having attained the age of discretion, can live with any man she chooses, without interference by her parents or guardians. It is not laid down definitely that the status of marriage cannot subsist between a girl under the age of twenty years and the man she loves unless her parents or

---

(69) အာထက် အရှိ ခဲ ပြီး: ဝေဘ မိန်း: ၊ ဒေ ပါ၌ ဝေယာဂ် ပြာ၊ အာ အုပ်အာထိန်း: အဝေဘ် အာ ပြုပ်ဂ် ကို ဘဝည်၊ ဝေတာ ဘင် ဂု ၊ ဒေ ပေ: ၊ ဒေ ထိုး: ပြာ: ဘဲ ၊ ဘု ငယ် ဖျင်: ဘဝ ဝေတာ ကျ ~~ကြ~~ ဖျိ ဝယ် ပါ၌ ကြ ဖျင်၊ အာ ဘဘ် ခွ ခဲ ဆယ် က ဂွ ရှိ ပေ: ဝေဘ်၊ ဘု ငယ် ဖျ ၊ ဒေ ခွဲ ခဲ သက် က ဝေ ရှိ ပြိင် ဝေ၊ အာ ဘယ် ဝေကြာင့် ခု ညှ: ဟု ပျ ကို: ၊ အာ အုပ် အာထိန်း: ကို ဘဝည်၊ ဝ ဘဘ ဟု ဝေဘ အာ ဝတွ. ကို ဝေဘင့် ဖြင့်: ဒေ ပါတ်၊ ဘု ငယ် ဒေ ကို ဘဘ ဝေဘင့်ဖြ ဖြင့်: ပြခ် ဝ ဘဘ ဝကြာင့် တ ညှ: ".

guardians consent to their union.

Again, section 22 of volume VI of the Manugye was not accurately translated by Richardson. It laid down the circumstances from which the consent of the parents may be implied, and further declared that the parents could not exercise their right to separate the couple after the girl had given birth to two or three children, or a period of five or ten years had lapsed since they came to live im the same or a neighbouring village. The last few lines of the Burmese text was not brought to the notice of the Chief Justice. The relevant portions of Richardson translation is as follows:-

"If when ordered to make compensation, he offers to live with her, he shall not retain her if she does not consent; let her be released from all obligations as his wife, and let him pay the price of his body".

The words underlined also purport to be a translation of ကေဝေး အဂ္ဂ မ ဆွေ့ တေး ; which should have been translated:- 'let her be freed from the status of a wife'. It presupposes the existence of marriage status and from which the girl will be releaased, if she does not consent to live with the man any longer.

There are other texts in the Dhammathats which support the view that status of marriage is acquired independently of the consent of the parents or guardians of a minor girl. Some of them may be mentioned.

The extract from Manugye cited in the Digest under the title, "In the absence of parents, brothers and sisters, marriage with a girl is only valid when she is given away by her guardian", (70), appears not to have been correctly translated. The Official translation is:-

"If, on the strength of his or her guardianship, any of the twenty-one classes of women (enumerated elsewhere) is given in marriage to a man by any of the following, namely, grandfather, grandmother, mother's elder or younger sister, father's elder sister, mother's elder brothers, governors or magistrates, the marriage shall be invalid if it is without the knowledge and consent of the bride's father. Only he to whom her father gives her in marriage shall be her husband.

The words underlined above purport to be a translation of

အာဏာရှင်၊ ဖခင် ဘဝကို ဖခင်အမြင်၊ ပြော၊ မိုင်၊ ဖခင်ရှေ့၊
အာဏာပေး၊ ဘုံ၊ ဘာ မင် ပြစ် ဂဝေ၊

The correct translation should read thus: "(The persons mentioned above have no right to give her in marriage so long as her natural father does not know(about the marriage), he alone to whom the father has given (her) shall be her husband". It will be seen from the Burmese texts that there is no mention at all about the validity of the marriage in those circumstances, neither is there any mention of the father's consent.

---

(70) Digest volume II, section 71.

This passage is no authority for the proposition that status of marriage is not created between the parties unless the minor girl is given in marriage by her parents or guardians, or with their consent. It simply lays down that the father has the paramount authority to give the minor daughter in marriage and also gave a list of other persons in order of preference who are competent to act in his place after his death.

The texts from the Kandaw and Kyannet cited in this section are not authorities on the point.

It is submitted that the heading of section 72 of the Digest, viz: "In the absence of parents, brothers, or sisters, marriage with a girl is valid only when she is given away by her guardian" is not justified by the texts cited there-under.

10. Doctrine of Factum Valet.

It may therefore be said, from the authorities cited above, that status of husband and wife subsists between the couple who eloped by mutual consent to become man and wife and lived together, not withstanding lack of parental or guardian's consent. Mere elopement without mutual consent and 'desire to marry and live as man and wife in future "does not, however, constitute a valid marriage (71)".

---

(71) Ma Hla Me v. Mg.Hla Baw, (1930) 8 Ran.425 at 433.
Ma Ngwe Ma v. Mg.Po Yin, A.I.R.(1931) Ran.R.177.

It may be said that the doctrine of "Factum valet quod fieri non debuit, (what should not be done yet being done, shall be valid) should apply. Under this doctrine, a marriage without proper consent of the parents or guardians, of performed even in contravention of an injunction issued under section 12 of the child Marriage Restraint Act, 1929 will be valid as factum valet, provided there is neither force nor fraud and the parties are otherwise competent to contract a valid marriage i.e. they are not within the prohibited degrees and the woman has no subsisting valid marriage. It is submitted that consent of the parents or guardian is not a condition precedent for the validity of marriage, and the guardianship so far as marriage is concerned is not so much a right as a duty.

11. Incidents of Marriage without Parental Consent. The marriage is valid ab-inito, but if the girl's parents disapprove of the union, they have a right to separate or may require their daughter to divorce her husband. It seems the girl can repudiate the marriage or divorce her husband although her parents remain indifferent to the union, presumably on the ground that a man who took advantage of the indiscretion of a minor girl without consulting the wishes of her parents must pay the penalty. In this connection, section 21 of volume VI of the Manugye may be clarified here.

"If the parents of a young woman shall not give her away, but she shall be stolen (seduced) away, even if she had ten

children, they have the power to cause her to separate from (the seducer) and give her to another; the man has no right to say she is his wife. Why is this? - because a daughter belongs to her parents."

The words "the man has no right to say she is his wife", (72) are misleading. Prima facie, it appears that no status of marriage subsists between the couple, but that is not so. It simply means that where the minor girl, either of her own accord or at the instance of her parents, seeks a divorce, the man cannot defend the suit by merely pleading that she is his wife.

12. Who can force separation?

Although the relatives of the minor girl set out above can give her away in marriage in the order of preference laid down in section 71 of the Kinwun Mingyi's Digest, volume II, none but her parents have the right to separate her from her husband, or to require her to divorce him for want of parental or guardian's

---

(72) ၊.ခ. ၌ ၁၈၁: ဘ၅၁ ခင် ပုံ၄ ၆၅။

consent (73). The Dhammathats assign that right only to the parents and not to the guardians. This is in accordance with the Buddhist scriptures (74) and follows from the parent's duty to arrange marriages for their children.

13. Suits by Parents to enforce separation and Woman's right of Divorce.

According to the Dhammathats, the parents may file a suit to enforce the separation of a married couple where they disapprove of the union (75). If the Courts today were prepared to enforce this right, they would presumably only do so in a suit filed within a reasonable time of the 'wedding', and only if the girl were under twenty years at the institution of the suit. If during the pendency of the suit, the girl's

---

(73) Digest volume II, sections 100, 145, 146.
(a) section 100: The Parents accept bridal presents from a man, but delay to give her in marriage to him. She, however, elopes with him. Her parents can take her back even after the birth of a child (Dhammathatkyaw).
(b) section 145: Although a daughter may have borne ten children after elopement, her parents still have the right to separate her from the man with whom she eloped, and give her in marriage to another man. The former shall not claim her as his wife, because a daughter is under the control of her parents, (Manugye).
(c) section 146: After elopement the young couple settle down in the same village in which the girl's parents live or in its neighbourhood; the parents are not entitled to separate their daughter from the man with whom she eloped, if five or ten years have elapsed after her settlement near them with their knowledge or if she has given birth to two or three children after such settlement (Manugye).
(74) Singalovada Sutta.
(75) Digest II, section 145.

parents or either the boy or girl died, or if the girl attained the age of twenty years, the suit would abate.

In a suit to enforce separation instituted by the parents, as in the husband's suit for restitution of conjugal rights, the point for determination is whether the girl's parents consented to the union of the couple either before or after the elopement, expressly or by necessary implication. If the issue is answered in the affirmative, the parents suit must be dismissed, and the husband's suit decreed.

The texts of Manugye and Manu cited in the kinwun Mingyis Digest (76) say that the suit must be brought within five or ten years, or before the girl has given birth to two or three children; Dhammathats says before two or three children have been born; Kyannet alone says within the period of five months or one year. The extracts from Dhamma, Manugye, Rà jabala and Manu cited in the next section of the Digest (77) enjoin the parents not to separate their daughter from her husband if she has previously been restored thrice and they failed to prevent her fourtheelopement. The texts cited in section 145 authorising the parents to separate their daughter from her husband even though she may have borne ten children must now be regarded as obsolete.

---

(76) Digest volumeII, section 146.
(77) Digest volume II, section 147.

Conditions of life now prevailing are quite different from what they were when the Dhammathats were compiled. When delay in bringing a suit amounts to acquiesence, the Courts will not entertain proceedings of the kind under consideration.

14. Courts may over-rule Parental Objections.

Although the Dhammathats insist upon the consent of the parents being obtained, where the spinster woman is under twenty years of age, there is authority for the view that the court can supply the want of the parents consent, when it is unreasonably witheld. Manugye says:- "If a young woman shall be taken away from her parents with her own consent, let the young man restore her to them three times; as the young woman is consenting, it shall not be called 'theft'. If he be accused before the Judge of stealing her, and he decides that they are to live together, and they do so, let them be considered as man and wife, and let the parents of the man pay the law expenses".

In section 147, under the general title "It is incumbent upon the parents of a young man to restore three times to her parents, the young woman with whom that son has repeatedly eloped"; the text of Manu is as follows:- (78).

"If a young man elopes with a girl, his parents shall restore her to her parents three times. If she elopes again for the fourth time, her parents cannot demand her restoration;

---

(78) Digest volume II, section 147.

and if in the event of their instituting legal proceedings before that, the Judge decides that the young couple shall become man and wife, the legal expenses shall be borne by the young man's father and paid to the Judge".

From the texts cited above, it is obvious that a Judge in the Kingdom of Burma could over-rule the objections of the girl's parents and declare the couple as man and wife, against the wishes of the parents, even before the fourth elopement. It is submitted that the present Courts in Burma have not only the right to do so, but also a duty to do so when this would be for the girl's benefit, and where refusal to grant it amounts to an abuse of the parental authority. That this view is not contrary to the present day sentiments of the Burmese people is evident from those provisions in the Buddhist Women's special Marriage and Succession Act, 1939, (79) which authorised the Court to impose fines on those who make frivolous objections to the marriage of a Burmese woman with a foreigner, and to declare the proposed marriage to be fit for solemnization under the Act.

If the parents succeed in separating the couple, it is submitted that the child conceived or begotten by her before the separation or divorce should be legitimate and treated as a 'pubaka' child because such a marriage is valid until set aside by

---

(79) Special marriage and succession Act,1939,sections 14, 15.

the parents. But so long as the decision in Ma E Sein's case stands, the consent of the parents or guardians or of the relations under whose protection a spinster under the age of twenty years is living, is absolutley necessary for the validity of her marriage. In such cases, the subsequent marriage or approval by the parents or guardians will not have the effect of legitimating children not born in wedlock, i.e. born before the marriage (80). There is no decided case on this point.

---

(80) U Tha Gywe, A Treatise on Buddhist Law, Vol.1, 13.

CHAPTER VIII

Husband and Wife.

Personal Rights and Obligations.

1. Mutual duties

Although, as it has been seen, the Buddhist Law of Marriage has little or nothing to do with Buddhism, when we come to consider the personal relations of husband and wife, their rights, duties and obligations, we find that the Burmese codes were almost entirely influenced by Buddhist ethical teaching. The texts in this respect are nearly all compiled from the Buddha's discourses (1). They are mainly moral precepts.

Marriage in Burmese Buddhist Law as in other systems of Law, like all other contracts, creates certain rights and obligations between the parties to it, and the Dhammathats lay down certain duties towards each other (2). The Kaingza (3) states that the qualities of a good husband are:- (i) striving to acquire wealth; (ii) providing the wife with a good house; (iii) maintaining the wife, children and slaves with tender watchfulness; (iv) looking after the latter with care; (v) supporting those of the relatives who are poor. Regarding the wife, the Warulinga says (4):- "A good wife prepares the meals and betel well and makes cheeroots skillfully, she helps

---

(1) U May Oung, Burmese Buddhist Law, 46.
(2) Digest II, sec. 208 to 239.
(3) Digest II, sec. 210.
(4) Digest II, sec. 211.

her husband to dress; and puts his clothes out in the sun and carefully stows them away; she performs all other duties of a wife efficiently; she manages the house and slaves, and carefully arranges her property, exposing some and concealing others; she is industrious in weaving, spinning, etc. and in working at flower work, dyeing, etc; she retires to bed after, and rises before, her husband has done so; she takes her meals after he has taken; she acquaints him with all matters, speak affably and pleasantly, and is very obedient to him; she does not frequent other people's houses; and she never entertains any idea of being unfaithful to her husband.

The picture of domestic life thus vividly portrayed has for its background the essential requisite of joint living. This is probably one of the reasons why at one time 'living and eating together' was looked upon as a necessary ingredient of a valid marriage, though it is only evidence, albeit the best evidence, of a lawful union (5). There may be cases of separate residence by arrangement between the parties, and circumstances might arise whereby one or the other is justified in living apart, but the normal obligation is that husband and wife shall dwell tobether. And generally it is only when they are living together that rights can be asserted and obligations enforced.

---

(5) Ma Gywe v. Ma Thi Da, (1891) II U.B.R. (1892-6) 194.

2. Place of residence.

In the absence of any justification the wife should live with her husband in the same house. The husband has the right to select the place of residence and the wife should comply with the husband's wish in this matter (6). The wife has no right to refuse to go and live with the husband in his house on the ground that she likes to stay in the house where she had stayed so long (7). But when the husband is able to live separately from his parents, the wife is not bound to live in the same house with her parents-in-law if she cannot pull on well with her parents-in-law (8). The husband cannot force the chief wife to reside with the lesser wife in the same house with him (9). Where a woman marries a man knowing that her husband has a chief wife she cannot refuse to live with her husband in the same house with the chief wife (10). But if a woman marries a man without knowing that he has a wife living she cannot be forced to live in the same house with the husband and chief wife (11). As a matter of fact very rarely two or more wives live with the husband in the same house (12).

---

(6) Ko Shwe Tha v. Ma Kho, (1893) 4 B.L.R. 143.
(7) ibid.
(8) Mg. Po Han v. Ma Po Lon, (1902) 8 B.L.R. 207.
Mg. Po Nyun v. Ma Su, (1908) 2 B.L.T. 60.
(9) Ma Ka U v. Po Saw (1908) 4 L.B.R. 340 (F.B.).
(10) Ma The v. Maung Tha E, (1897) 1 U.B.R. (1897-01) 104.
(11) Mg. Po We v. Ma Tha Hla, (1909) 3 B.L.T. 104.
(12) S. C. Lahiri, Burmese Buddhist Law, 45.

3. Restitution of Conjugal Rights.

(i) Suit for Restitution of Conjugal Rights lies in Buddhist Law.

An action, by either the husband or the wife, for restitution of conjugal rights, is not directly given by the Dhammathats, but, in view of what has preceded regarding the duties of a married pair towards each other, such an action is a natural remedy where one or the other fails in the performance of such duties. It is wrong to suppose that no provisions existed in the Dhammathats to compel a spouse to return to the other partner where there was desertion without sufficient excuse. The Mânussika and Manugye Dhammathats authorised imposition of heavy fines on a deserting spouse, and the latter further provided that the said penalty could not be waived even where the spouse at fault subsequently undertook to restitute conjugal rights with the innocent spouse(13). The Kyannet Dhammathat provided punishment for a wife who discarded her husband because he was bad, but permitted the husband to look for another wife if his wife was not good(14).

The Dhammathats also contained provisions for dealing with a spouse who deserted the other while the latter was suffering from leprosy, blindness, etc., or had become a pauper. The extract from the Vilâsa Dhammathat contemplated

---

(13) Digest, II, sec. 306.
(14) Digest, II, sec. 308.

a complaint being made to the authorities against the guilty spouse in such cases, for an order directing resumption of conjugal relationship with the innocent spouse (15). Hence in Maung Kin v. Ma Hnin Yi (16), Jardine, J., of the Special Court rightly observed: "So long as the marriage bond subsists, the wife is at Buddhist Law required to do her part in contributing to the joing comfort and well-being, as shown in such texts as section 13 of the 5th Book of the Manu-Kye and in other texts. Desertion of a husband seems once to have been punishable."

In the face of the said provisions found in the Dhammathats, it is submitted that it is wrong to suppose that the remedy by way of a suit for restitution of conjugal rights was not at all contemplated by the Dhammathats where one of the couple failed in his or her marital duty.

The question whether a suit for restitution of conjugal rights lies among Burmese Buddhists came up before the Special Court in Nga Nwe v. Mi Su Ma (17) as early as 1886. In that case, MacEven, J., held that marriage Burmese Buddhists may be dissolved at any time by mutual consent, and where such consent is wanting, it cannot be dissolved except on some grounds recognised by the Dhammathats, and not by the mere volition of one of the parties; and consequently, so long as a marriage is

---

(15) Digest, II, sec. 309 and 310.
(16) (1882) S.J. 114.
(17) (1886) S.J. 391.

not regularly dissolved in one or other of these ways, the contract subsists, and during its subsistence, a suit for restitution of conjugal rights will lie. Sure then", said Mac Even, J., "so long as the matrimonial contract subsists, the parties to it are entitled to enforce it, and where there has been no divroce, either party is entitled to claim conjugal rights, and if denied, to sue for them."

In Mi Kin Lat v. Nga Ba Soe (18), however, the learned Judicial Commissioner of Upper Burma held that as one of a Buddhist couple might divorce the other by mere caprice, no suit for restitution of conjugal rights would lie among Burmese Buddhists in as much as a decree for restitution of conjugal rights would be rendered nugatory at the will of the unsuccessful party. But the correctness of this was challenged in Nga Chin Dat v. Mi Kin Pu (19), where-in the court held that so long as the marriage tie is not regularly dissolved ... the contract of marriage subsists and during its subsistence a Burman Buddhist's suit for restitution of conjugal rights will lie. Shaw, J., has also held further that there is nothing in Buddhist Law as to divorce at will of one party, on surrender of the joint property and payment of the joint debts, in the absence of fault in the other party which is inconsistent with the observance of the conjugal duties in a

---

(18) (1905) II U.B.R. (1904-06) Buddhist Law, Div. 3.
(19) (1909) II U.B.R. (1907-09) Marriage, Restitution of conjugal Rights, 1.

subsisting marriage, or will bar a suit for restitution of conjugal rights. This view was approved by the Rangoon High Court in Ma Thein Nwe v. Maung Kha (20) and Maung Kywe v. Ma Kyin (21); it may, therefore, be taken as settled law that a suit for restitution of conjugal rights lies among Burmese Buddhists.

(ii) What Plaintiff must prove.

In Maung Sein v. Kin Thet Gyi (22), it was held that the plaintiff in such a suit must prove that there is no fault on his or her part and that the defendant was not justified in withdrawing from cohabitation. Minority of the wife is no defence in a suit of this nature (23). Ill treatment and desertion by the plaintiff is a valid defence under Buddhist Law (24). In Maung Po Han v. Ma Wa Tha (25), it was held that a single act of cruelty by the wife's mother-in-law is not sufficient ground for refusing to return to her husband's house. But in Ma Thein Nwe v. Maung Kha (26) adultery on the part of the plaintiff was considered as a complete defence to such a suit. A suit for restitution of conjugal rights is purely a private suit between two persons. No one else has any right to intervene in the matter, and the Judgement in such a suit cannot be treated as a judgement in rem within section 41 of the Evidence Act (27).

---

(20) (1929) 7 Ran. 451.
(21) (1930) 8 Ran. 411. (1904-6)
(22) (1904-06) II U.B.R. Marriage 5.
(23) Maung Sein v. Kin Thet Gyi, (1904) II U.B.R. (1904-06) B.L. Marriage 5. (24) Contd: next page

Polygamy being legal, it would follow that a man may obtain a decree for restitution of conjugal rights against his lesser wife. It is doubtful, however, whether the Courts would encourage the practice by allowing him to enforce such a decree. In Maung Kyaik v. Ma Gyi (28), Burgess, J.C., said; "If the respondent is only a lesser wife or concubine and is not a wife in the proper acceptation of the term, the Courts would of course not enforce cohabitation." And later, "It might be a question whether any relief ought to be granted to the husband of two or more wives, and whether it would not be proper to proceed on the analogy of section 26 of Act XXI of 1886, which enacts that in such a case if the husband is cohabiting with one of his wives as man and wife, or if one of his wives is ready and willing so to cohabit with him, the suit for restitution of conjugal rights might be dismissed." In Maung Shwe Gon v. Ma Mi (29), it was held that a man has no right to compel a woman to return to the anomalous position of a concubine.

(iii) How decree is enforced.

A suit will not lie by a husband to recover possession of the person of his wife, for Jeton Karr, J. observed (30),

---

(24) Maung Po Han v. Ma Wa Tha (1917) 39 I.C. 114.
(25) (1917) 39 I.C. 114.
(26) (1929) 7 Ran. 451.
(27) Ma Po Khin v. Ma Shin, (1933) 11 Ran. 198.
(28) (1897) II U.B.R. (1897-01) 488.
(29) (1900) 2 L.C. 155.
(30) Choutun Bebee v. Ameer Chand, (1865) 6 Sutherland W.R. 105.

"A wife cannot be looked upon as property, moveable or immoveable, which passively undergoes transfer for one person to another. If she could be so dealt with, it would have to be determined whether she was moveable or immoveable, and some curious questions of limitation might arise; and if the wife were property, she could not obviously, be a party to the suit, as she is in this case, and always must be in suits of this nature and, further; it seems to me repugnant to the principles of civilised society, whether European or British Indian, that an adult human being, wife or otherwise, should be delivered over as a horse or other brute animal might be. In truth, it seems to me that the functions of the court in a suit of this nature must be simply to determine as between Husband and Wife, whether he is or is not entitled to his marital rights." A decree for restitution of conjugal rights is of the nature of a decree for specific performance and as such, is entirely discretionary with the Court. Under Order XXXI Rule 32 of the Code of Civil procedure, 1908, it may be enforced by detention in the civil person of the judgment-debtor, or by the attachment of his property, or by both, if he has had wilfully fialed to obey it. Before the amendment of this rule by XXIX of 1923, it was held that the tendency of modern legislation is against sending woman to jail in civil matters and therefore ordinarily, the court passing a decree for the restitution of conjugal rights against a wife should direct, in the exercise

of its discretion under this rule, that the decree shall not be executed by the detention of the wife in civil prison. In view of the amendment of this rule, a decree for the restitution of conjugal rights can no longer be exercised by imprisonment, whether the decree be against the husband or the wife (31). Where an attachment of property has remained in force for one year and the judgment debtor has not obeyed the decree, the attached property may be sold by order of the court on application made by the decree-holder, and out of the proceeds, the court may award to the decree-holder such compensation as it thinks fit and shall pay the balance, if any, to the judgment-debtor on his or her application. Where the judgment-debotr has obeyed the decree and paid all costs of executing it which he or she is bound to pay, or where at the end of one year from the date of the attachment, the decree-holder has failed to apply to the court for sale of the attached property, or if made, has been refused, the attachment shall cease.

Under Order XXI, Rule 33 of the Code of Civil Procedure, 1908, the court may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debotr shall make to the decree holder such periodical payments as may be just, and if it thinks fit, require that the judgment-debtor shall to its satisfaction,

---

(31) Dhannu v. Mst. Piari, (1944) A.I.R. All. 836.

secure to the decree-holder such periodical payments. Such an order may be varied or modified from time to time by the Court, either by altering the time of payment or by increasing or diminishing the amount, or it may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part, as it may deem just. Any money ordered to be paid under this rule is recoverable as though it were a decree for the payment of money, by detention in civil prison of the judgment-debtor, or by the attachment and sale of his property or by both, under Order XXI, Rule 30 of the Code of Civil Procedure, 1908.

4. Maintenance.

(i) Right to claim maintenance from husband.

"Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian countries, a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife as one person, and will not permit an action by the wife against her husband; but no such principle is known to the Mohamedan, Hindoo, or Parsee Law; and the Supreme Courts at Calcutta and here have always treated a native married woman as feme sole, and indeed, it is quite impossible, upon any

a priori or natural reasoning to treat them as anything else (32)". This observation of Jackson, J. applies with equal force to similar actions under Burmese Buddhist Law.

The right of a Buddhist wife to maintenance as against her husband is not merely contractual in nature. Both under the moral and religious code (33) and also the Dhammathats (34), the husband is under an obligation to maintain his wife, and to provide her with suitable clothes and ornaments. Even in sanctioning polygamy, the Dhammathats were careful to lay down that only he who could by his own skill and labour provide maintenance should have more wives than one (35).

The Dhammathats required the husband to make provisions for the maintenance of his wife and children, before going away on a journey to acquire property and knowledge, to fight in the battle, or to perform work of merit (36). They also contained provisions imposing obligations on the husband to maintain his wife who meets with a reverse of fortune, or who is physically incapacitated due to blindness, lameness, leprosy, insanity or similar diseases (37). According to the Mânussika, "for a husband the maintenance of his wife and placing her in entire charge of the whole of his property is a great merit (38). It is, therefore, obvious that there is a positive

---

(32) Ardaseer Cursetjie v. Perozeboye, (1856) 6 M. I.A. 348 at 372-373.
(33) The Mingala Sutta, Verses 5 and 10.
(34) Digest, II, sec. 208 and 236.
(35) Digest, II, sec. 253.
(36) Digest, II, sec. 244.
(37) Digest, II, sec. 310; Manugye V, sec. 18.
(38) Digest II, sec. 212

duty is imposed upon the husband to maintain his wife or wives under Burmese Buddhist Law, and whereby law, a person is under a duty towards another person, there is vested in that order, a corresponding right to have that duty performed. For, their Lordships of the Privy Council had said, "If the law which regulates the relation of the parties gives to one of them a right and that right is denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong, there must be a remedy in a court of justice (39)."

Hence, in ancient days, desertion by either spouse accompanied by failure to provide maintenance for the other without sufficient cause was punishable as a crime, and according to Mânussika, he should undergo six hundred lashes. Under the Manugye, that penalty could not be remitted even if the guilty party undertook to support the other (40).

A claim by a wife for maintenance is clearly a question regarding marriage, and therefore when the parties are Buddhist, the Buddhist Law must form the rule of decision by reason of the provisions of section 13(1) of the Burma Laws Act (41).

---

(39) Moonshea Buzloor Ruheem v. Shumsoon-nissa Begum, (1867) 11 Moo. I.A. 551 at 586.
(40) Digest II, sec. 306.
(41) Maung Hmun Taw v. Ma Pwa (1884) S.J. 258 (P.C.); Tha Mya v. Makin Pu (1940) Rang. 807.

The right of a Buddhist wife to maintainance as against her husband was recognized by the Privy Council as early as 1884 in Maung Hmun Taw v. Ma Pwa (42) in which their Lordships observed, "It is the duty of the husband to provide maintenance for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that the law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during whihch she has done so." The above observation was followed in Ko Ong v. Ma Yon (43) wherein Agnew, J., decided that having regard to the Burmese Law as to the property of married persons, no such suit for past maintenance would lie where the wife had maintained herself with her own means. In Ma Saw Nwe v. U Aung Soe (44), the question was whether a suit for future maintenance lies under the Burmese Buddhist Law. Dunkley, J., discussed the texts of the Dhammathats dealing with the right of the Buddhist wife to maintenance as against her husband and refuted the contention of counsel for the defendant that to allow such an action would be tantamount to allowing the wife to sue for her own property which is in her possession

---

(42) (1884) S.J. 258 (P.C.).
(43) (1893) P.J. 31. A suit for arrears of maintenance is also maintainable under Hindu Law. Ekradeswari v. Homeswar
((1929) 56 I.A. 182. (44) The
(44) (1939) Rang. 527;

through her husband, and eventually held that a suit for future maintenance by a Buddhist wife is maintainable against her husband who is living separately from her; that such an action is a "suit of a civil nature" within the meaning of section 9 of the Code of Civil Procedure (Act V of 1908) (45), and that she can claim maintenance from the date of the institution of the suit for so long as the marriage between them subsists, or for so long as they continue to live separately, but not for arrears of maintenance before such date.

(ii) Effect of Wife's financial position on right to maintenance.

In Maung Hmun Taw v. Ma Pwa (46), their Lordships of the Privy Council had observed, though obiter, that it appeared to them that a suit for maintenance would not lie where the wife had sufficient means of her own. U May Oung was of the same opinion (47) and although this point was argued in Ma Saw Nwe's case (48), Dunkley, J., declined to decide it, as it was not alleged in the pleadings that the plaintiff had such means. The relevant texts in the Dhammathats make no distinction between poor and well-to-do wives, nor do they say specifically that only needy wives are entitled to recover maintenance from their husbands. The obligation to maintain a

---

(45) "The courts shall ... have jurisdiction to try all suits of a civil nature excepting sutis of which their cognisance is either expressly or impliedly barred."
(46) (1884) S.J. 258 (P.C.).
(47) Leading Cases on Buddhist Law, 53.
(48) Ma Saw Nwe v. U Aung Soe, (1939) Ran. 527.

wife is an incident of marriage, and therefore it may be argued that she has every right to expect support from him, whether or not she has sufficient means of her own to support herself. In the circumstance, it is submitted that the better view is that a suit for future maintenance will lie at the instance of a wife whether she has sufficient means or not.

(iii) Amount of Maintenance.

No fixed fule can be laid down as to the amount of maintenance which the wife is entitled to have; each case must be judged according to the nature of its circumstances. The sum awarded should be sufficient to enable the plaintiff to live in a manner consistent with her position as the wife of the defendant, with the same degree of comfort and reasonable luxury as she had in husband's home, unless there are circumstances which affected one way or the other, her mode of living there. The amount depends "upon the gathering together all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members on a reasonable view of the change of circumstances possibly required in future, regard being of course, had to the scale and mode of living and to the age, habits, wants and class of life of the parties." (49)

---

(49) Ekradeswari v. Homeswar, (1929) 56 I.A. 182.

In Ma Saw Nwe's case (50), the court did not lay down any principle for assessing the amount of maintenance, in as much as the parties had agreed on the sum to be awarded if the suit was held to be maintainable.

It may be of interest to note that at Mahomedan Law, the husband is bound to maintain his wife irrespective of her private means. "Even where she is a rich woman and he a poor man, she is absolutely entitled, if she chooses to be provided at his expense, on a scale suitable to his means, with food, clothing, housing, toilet necessaries, medicine, doctor's and surgen's fees, and baths, and also the necessary servants, at least where the wife is of a social position which does not permit her to dispense with these, or in sickness. The wife need not spend a penny of her own money on these objects." (51). Even before the enactment of the Hindu Adoption and Maintenance Act 1956, a Hindu wife was entitled to maintenance, whether possessed of property or not (52).

In Tha Mya v. Ma Kin Pu,(53) Dunkley, J., pointed out that, when the wife is morally bound to support a child or children, that fact should be taken into account in assessing the

---

(50) Ma Saw Nwe v. U Aung Soe, (1939) R.&R. 527.
(51) S.G. Vesey-Fitzgerald, Muhammedan Law, (1931) p. 957.
(52) Jayanti v. Alamelu, (1904) 27 Mad. 45;
Appibai v. Khimji, (1936) 60 Bom. 455.
(53) (1940) R.&R. 807.

quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. He further said,

"In my view, the income of the husband from all sources should be calculated, and the wife should ordinarily be awarded a sum not exceeding one third thereof in any case, applying the rule of Nissaya and nissita (54). By a pure, but curious, coincidence, a wife in England is as a general rule allowed by way of maintenance upto $\frac{1}{3}$ of the parties combined incomes." (55). It has been held that a Hindu wife, deserted by her husband without reasonable cause, is entitled to recover one-third of her husbands property for her maintenance (56).

In Burmese Buddhist Law, the husband is within his right in taking a second wife provided he maintains the first wife. It was contended in Tha Mya v. Ma Kin Pu (57) that in such circumstances the first wife should not get more than $\frac{1}{6}$ of the husband's income, but the Court held that the wife should, in addition have sufficient to maintain the husband's child living with her.

---

(54) The supporter (nissaya) always get double the share of the dependant (nissita) in the property to which this rule is applicable.
(55) Tha Mya v. Ma Kin Pu, (1940) Ran. 8071.
(56) Ramabai v. Trimbak, (1872) Bom. H.C. 283.
(57) (1940) Rangoon. 807.

(iv) Variation of the Amount Awarded.

Can the amount of maintenance fixed by decree be varied, and, if so, under what circumstances? It might be contended that a decree cannot be varied or set aside except on the ground of fraud. At Hindu Law unless the decree has a provision enabling the parties to apply for modification, the rate of maintenance fixed by decree can only be varied by bringing a separate suit and alleging altered circumstances (58). In regard to change of circumstances, it has been said, "In assessing a claim based on the changes of circumstances, the Court is entitled to look into the changes, not only in the needs of the widow, but also any change of those other circumstances to which the Court had regard in fixing the original rate of maintenance. For instance, the Court must have regard to any rise of prices; it must have regard to additional expenses necessitated by the deterioration of the health of the maintenance holder; it must also have regard to any reasonable change in the standard of comfort and in the conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. .... Finally, the Court must have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance." (59). But a separate suit is not necessary

---

(58) Gheshiram v. Kundanbai, (1941) Nag. 513.
(59) Veerayya v. Chellamma, I.L.R. (1939) Mad. 234.

where there is a clause in the decree which leaves the parties at liberty to apply for its own variation (60). In Ekradeswari v. Homeswar (61), their Lordships of the Privy Council observed that there should be a clause of the nature suggested above in every decree for maintenance. Such being the position in Hindu Law, it is submitted that there is no reason why different considerations should apply to the same questions arising at Burmese Buddhist Law. The same rules should apply to suits for maintenance and, on grounds of justice, equity and good conscience, the court should vary the sum fixed by the decree on ground of altered circumstances, except in the case where there is an agreement between the parties contained an undertaking to adhere to the specific rate agreed for all times, as in Chinnammal v. Venkataswami (62).

(v) When Maintenance can be claimed.

The wife cannot claim maintenance if she is in breach of her duty to live with her husband in normal circumstances, but the wife may live separately from her husband without forfeiting her right to maintenance in the following circumstances:-

(1) Where she has been deserted by the husband (63).

(2) Where the husband has treated her with cruelty, which may be either physical or legal (64), and

---

(60) Rammasangjii v. Kundan, (1902) 26 Bom. 707.
(61) (1929) 56 I.A. 182.
(62) A.I.R. (1927) Madras 705.
(63) Ma Nyun v. Mg. San Thein, (1927) 5 Ran. 537 (F.B.).
Ma Saw Kin v. Mg. Tun Aung Gyaw, (1927) 6 Ran. 79 (P.C.).
(64) Mg. Po Aung v. Ma Nyein, (1904) 10 B.L.R. 132 (P.C.).

(3) Where the husband has taken a second wife without justifiable causes (65), or without the consent of the superior wife (66).

Unless otherwise specified expressly in the decree for maintenance, it remains in full force until the death of either party, or the dissolution of the marriage, or the re-union between the parties, whichever occurs first.

(vi) Wife's Obligation to Maintain Husband.

Inasmuch as each spouse acquires an interest in the pre-nuptial property of the other, as well as in the property acquired during marriage, it may well be asked whether the wife is under an obligation to maintain her husband under Burmese Buddhist Law. This question has never been raised in legal proceedings but that does not mean that no provisions exist in the Dhammathats from which such an obligation may be inferred. Section 309 of the Kinwun Mingyi's Digest, Volume II casts an obligation on a wife to maintain her husband who meets with a reverse of fortune, or is physically or otherwise disabled by reason of certain diseases from which he is suffering. According to the texts from the Vilâsa, Myingun, Dhammathatkyaw, Vaṇṇanâ, Râsi, Pâṇaṁ and Kyetyo, the husband could even sell his wife to slavery and utilise the proceeds for his maintenance and to pay for treatment of the disease(67).

---

(65) Mg. Hme v. Ma Sein, (1918) 9 L.B.R. 191 (F.B.).
(66) Ma Ka U v. PO Saw, (1908) 4 L.B.R. 340 (F.B.).
(67) If the wife fails to maintain or neglects to look after her husband who has lost his possession, or has become

(contd. on next page)

Moreover, both sections 306 and 309 of the Digest contemplated the imposition of penalties on the wife, especially in times of her husband's distress (68). In the circumstances, it is submitted that the duty to maintain is reciprocal, and consequently, the husband may sue his wife for maintenance if she abandons him without sufficient cause. The fact that actions of this kind will rarely be brought should not be considered a valid ground for denying him the right, and it is possible that the courts will decree a maintenance suit of this kind especially where the wife who owns valuable separate property deserts her needy husband. It may be pointed out that similar right has been provided in Hindu Law recently (69) and Agarwala said (70), "But the provisions requiring her to pay maintenance

---

(67) (continued from the last page)

leprous, insane, blind, or maimed, she may either be sold or be severely punished and compelled to try and cure him of the disease, and to maintain him as long as he lives. (Vilâsa) Digest, sec. 309, Vol. II.

(68) If either the husband or the wife is guilty of desertion, he or she shall undergo six hundred lashes. The corporal punishment shall not be remitted even if the guilty party undertakes to support the other. Manugye, sec. 306, Digest II.

(69) The Hindu Marriage Act, 1955, (No. 25 of 1955), sec. 24.

(70) D.N. Agarwala, "The Hindu Marriage Act, 1955, 55.

to the husband when she is the guilty party and has means, while the husband has none or unsufficient means, is a revolutionary departure from the hitherto accepted motions of the relationship between the sexes under all systems of law including the Hindu system."

This is one of the points that illustrate that there is very little that is common between Hindu law and Burmese Buddhist Law on marriage. The basic conception of the two are entirely different.

(vii) Statutory Obligation.

Apart from the civil rights, the husband is under a statutory obligation to maintain his wife or wives, and his legitimate and illegitimate children who are unable to maintain themselves, under section 488 of the Criminal Procedure Code (Act V of 1898). A competent Magistrate may award a sum not exceeding one hundred rupees per mensem for each claimant thereunder, payable if so ordered from the date of application such an order may be enforced against the husband or the father as the case may be, by attachment of his property or arrest and imprisonment. It is not obligatory that the order shall be enforced in the district in which the person directed to pay lives. (71)

A husband cannot contract out of his statutory liability to maintain his legally married wife and children (72). Even a minor husband is bound to maintain his wife for he can have no difficulty in

(71) U Hpay Latt v. Ma Po Byu,(1935) 3 Ran. 289.
(72) Mg. Gyi v. Maung Pe,(1901) 1 L.B.R. 126.

finding remunerative work if he makes serious endeavour to obtain it (73). When the validity of the marriage is called into question no maintenance order can be passed until the woman can prove that she is the legally married wife of the man according to the personal law by which the parties are governed (74). A wife is not debarred from claiming maintenance even if she has ample means of her own (75). It was at one time held that if, after the passing of the maintenance order by the Criminal Court, the husband succeeded in getting a decree from the Civil Court for the restitution of conjugal rights against the wife, and she still refused to comply with the terms of the decree, she ~~too~~ lost her right to maintenance as the decree of the Civil Court determined the order of the Criminal Court (76). But in a later case the correctness of this view that a decree for the restitution of conjugal rights ipso-facto discharges an order for maintenance of the wife was doubted; the court held that section 489(2) has changed the law on the point and that the order of a competent Civil Court does not of itself cancel the maintenance order passed under the provisions of the Criminal Procedure Code; in considering an application for the discharge of such an order, the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought

(73) Ma E Sein v. Mg. Hla Min, (1925) 4 B.L.J. 258.
(74) Wa Foon v. Ma Thein Tin, (1913) 7 B.L.T. 71;
~~(75)~~ Pwa Me v. San Hla, (1914) 7 L.B.R. 270.
(75) Maung Son v. Ma Thet Nu, (1904) 10 B.L.R. 166.
(76) Maung Pan Aung v. Ma Hmwe Bon, (1907) 1 B.L.T. 104;
Maung Tha U v. Ma Mya Khin, (1915) 9 B.L.T. 162.

before him (77). In Maung Po Kwe v. Ma Pwa Shein (78), it was held that a decree for restitution of conjugal rights does not ipso-facto cancel an order of maintenance, and that the Magistrate will be justified in refusing to cancel such order where the husband fails to provide separate accommodation for his wife in terms of the decree passed in his favour. A re-union after the passing of the maintenance order determines the said order (79). A divorce after the passing of the maintenance order will also terminate the same. A wife living in adultery is not entitled to maintenance under section 488 of the Criminal Procedure Code. The words 'living in adultery' in section 488(5) of the Criminal Procedure Code point to a continuous course of conduct, and not to isolated acts of immorality (80).

As already stated, a husband who fails to comply with the order is liable to suffer imprisonment, but a person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears of maintenance cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears (81). Nor can a person be sentenced to more than one month's simple imprisonment at any

---

(77) Maung Dun v. Ma Sein, (1925) 3 Ran. 150.
(78) (1939) R.G.R. 741.
(79) Ma Tin v. Maung Hla Pe, (1908) 2 B.L.T. 5.
(80) Ma Mya Khin v. Godenho, A.I.R. (1936) Ran. 446.
(81) Maung Kyi Pe v. Ma Htu Tn, (1931) 10 Ran. 176.

one time (82). In Tobee Bibee v. Abdool Khan (83), it was held that interim protection under the old Insolvency Act could be made to apply to all debts and liabilities mentioned in the schedule, including money due under an order of maintenance. But the correctness of that decision was doubted in Mariam Bi Bi v. A. E. Motala (84) by the Rangoon High Court, though no definite decision was given on the point.

(viii) Maintenance of Child.

As regards the father's liability to maintain his children whether legitimate or illegitimate so long as they are unable to maintain themselves there are the express provisions of section 488 of the Criminal Procedure Code. The father cannot contract out of this statutory liability (85). But an adopted child is not entitled to claim maintenance under section 488 of the Criminal Procedure Code from its adoptive father (86).

In Baran Shanta v. Ma Chan Tha May (87), it was held that the words 'unable to maintain itself' in section 408 of the said Code, mean inability to earn a complete living such as an adult person might earn, without dependency on any other person. In fixing the sum payable, the Court should pay no regard to the fact that the child is able to contribute towards its

---

(82) Zaw Ta v. K. E., (1914) 7 L.B.R. 351.
(83) (1879) 5 Calcutta 536.
(84) (1931) 10 Ran. 71 at 73.
(85) Ma Tin v. Maung Hla Pe, (1908) 2 B.L.T.5.
(86) Ma E Mya v. U Koko Gyi, A.I.R. (1937) Ran. 370.
(87) (1924) 2 Ran. 682.

support by means of its own labour or work of any kind; it would be contrary to public policy to encourage child labour by holding that a boy of eleven years should contribute towards his own support when he should be in school, and that a man is bound to feed and clothe his minor off-spring, and he cannot be heard to say that the latter should help him to fulfil his obligation.

Until recently, it was supposed that maintenance did not include school fees for the child. But in Maung Shwe Ba v. Ma Thein Nya (88), Mackney, J., said, "Man does not live by bread alone, nor is he like the animals. In a civilized state a human child cannot be maintained simply by providing it with clothing and food. The mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience; and in my opinion, in our time, 'maintenance' should be held to include this."

When the father has made over certain property to the mother in consideration of her agreement to maintain the child, an order for maintenance was rightly refused when the property existed at the time of making the application and furnished sufficient means for the support of the child (89). As the father has a continuing obligation to maintain his child, the payment of a lump sum to the mother on some previous

---

(88) (1938) Ran. 673.
(89) Maung Mya v. Ma Bok Son, (1897-01) I U.B.R. 108.

occassion is not a sufficient answer to a maintenance application on behalf of the child (90). Even if the mother be divorced the father's liability to maintain his children continues (91), though the children live with the mother who is rich (92). Where mother obtained an order of maintenance for her child against the father and later on the father secured a decree from the Civil Court against the mother for the restitution of conjugal rights but no order giving him the guardianship of his child, the obligation to maintain the child under the order of the Criminal Court remained binding on him (93).

Alteration of Maintenance Allowance.

On proof of a change in the circumstances of any person paying or receiving an allowance under section 488 of Criminal Procedure Code, the Magistrate may either reduce or increase it as he deems fit under section 489 of the said Code. Advance in age of a child is a change in the circumstances of the child within the meaning of section 489 of the said Code (94).

Although the Court may include the cost of minimum education for the child in awarding maintenance, it is not competent to sanction expenses for higher education under the

---

(90) Ma Hnin Byu v. Maung Myat Pu, (1902) I L.B.R. 189.
(91) Mi Pye's case (1881) S.J. 145;
Maung Lu Gyi v. Mi Shwe Me,(1885) S.J. 362.
(92) Mi Thein v. Nga Po Nyun,(1913) 7 B.L.T. 34.
(93) Nan Saw Shwe v. Maung Hpone, (1912) 6 L.B.R. 127.
(94) Maung Shwe Ba v. Ma Thein Nya, (1938) R.&R. 673.

summary procedure provided by section 488 of the said Code. In Maung Shwe Ba's case, (95) Mackney, J., remarked: "So long as some minimum schooling is provided for the child, I do not think that its guardian can claim more under the summary procedure of the Criminal Procedure Code. If it is thought that Maung Shwe Ba should be compelled to provide for the education of his child in an Anglo-Vernacular school, the guardian might have recourse to a civil suit."

The maintenance order in favour of a child does not cease until it attains majority and is able to maintain itself. The provisions of section 488 of the Code of Criminal Procedure ordinarily contemplate a case of a child unable to maintain itself owing to its tender years, and in ordinary cases, a strong presumption would arise that when a child reached the age of majority (i.e. eighteen years), it was no longer unable to maintain itself. It seems that a child continues to be entitled to maintenance even after attaining majority, if by reason of any defect, mental or physical, it cannot earn a living (96). The order in favour of a child ceases as soon as the father lawfully obtains custody of it, or gets a custody order from a competent Civil Court.

(ix) Liability of a Buddhist Monk to pay Maintenance.

(a) Liability of a phongyi to maintain a child begotton by him while a member of the Order.

Once an order for payment of maintenance is passed, the Court will enforce it if it is satisfied that it has been

(95) (1938) Ran. 673.
(96) U Ba Thaung v. Ma Aye, (1932) 10 Ran. 194.

disobeyed without 'sufficient cause'. Whether a person has 'sufficient means' or 'sufficient cause' within section 488 of the Criminal Procedure Code must be determined upon a consideration of the circumstances disclosed in each case. The term 'sufficient means' is not confined to pecuniary resources, and a mere denial of an able-bodied man of sufficiency of means is not conclusive proof of want of sufficient means (97). Hence, the question arises whether a Buddhist monk is amenable to the provisions of section 488 of the Criminal Procedure Code.

There was a conflict of authority as to the point whether the father can avoid this statutory liability when his is a phongyi. It was held in one case that a phongyi is not liable to pay maintenance for his child as ordered by a Criminal Court (98) on the ground that a phongyi does not possess any property, except such as necessary for his religious life; but in another case it was held that a father cannot evade the statutory obligation to maintain his child by pleading that he is a phongyi (99) on the legal presumption that an able-bodied man in Burma who is not prevented by any physical infirmity from working has sufficient means to maintain his child. In both these Upper Burma cases the father, while wearing the yellow robe, had clandestine intercourse with the mother of his illegitimate child. In a later Full Bench case (100), Page, C.J., said, "Upon what legal principle or

---

(97) Maung Tin v. Ma Hmin, (1933) 11 Ran. 226 (F.B.)
(98) Ma E Shi v. U Aditsa, (1922) 1 B.L.J. 97.
(99) U Thiri v. Ma Pwa Yi, (1924) 4 U.B.R. 138.
(100) Maung Tin v. Ma Hmin, (1933) 11 Ran. 226 (F.B.).

upon what reasonable or moral ground could an order to that effect be supported? I cannot conceive of any, surely, for so holding; there could be no justification. A man is none the less the father of his child because he happens to be a phongyi, and the child of a monk will starve as certainly as the child of a lay man if it is not supplied with substance. ... Many a man has found fatherhood irksome, and will feign to be released from the obligations that attach to it. The answer however, that is given to such a person, as well by the legislature as by the moralist, is that he should have considered the consequences that might ensue before he ran the risk of becoming a father." After pointing out the error in the decision of Saunders, J.C. in Ma E Shi v. U Aditsa (101) Page, C.J., continued; "Why should a phongyi in sexual matters be sacrosanct? And what difference does it make whether he does or does not enter the priesthood in order to avoid his responsibilities as a father? By so doing, it seems to me that he will acquire merit neither in this world nor the next."

The effect of the said decision is that the Full Bench adopted the principle laid down by Mac Coll, J.C., in U Thiri v. Ma Pwa Yi (102), that is, a phongyi is not placed in a privileged position, and is not exempt from liability to have a maintenance order passed or enforced against him under

---

(101) (1922) 1 B.L.J. 97.
(102) (1922) 4 U.B.R. 138.

the statute, merely because he is a monk (103). So if a phongyi begets a child he cannot use his robe as a shield for avoiding the statutory liability to maintain his child. It is submitted that this is the better view, because there is a legal presumption that every able-bodied healthy man in Burma possesses sufficient means to maintain his child. More-over according to the rules of his Order sexual intercourse ipso-facto reduces a phongyi immediately to the status of a lay man for ever (104).

(b) Liability of a father to maintain his child after admission to the Order.

In A.R.P.L. Firm v. U Po Kyaing(105), a Full Bench of the Rangoon High Court held that, where a person becomes a phongyi without retaining an animus revertendi, he is automatically divested of all his property; he relinquishes all title to the same, and the only property he can possess are articles falling within the four requisites or resources - food, clothing, lodging and medicine. After ordination he never addresses the child and the child also never addresses him as his father; he dies a civil death and severs all ties of relationship with his people (106). He and his child do not inherit from each other (11) and in fact ordination snaps the relationship between the father and the child in the eye of civil law. Though this rule applies to a suit for

---

(103) A.R.P.L. Firm v. U Po Kyaing, (1939) R.L.R. 311.
(104) S.C. Lahiri - Burmese Buddhist Law, 49.
Maung Tin v. Ma Hmin,(1933) 11 Ran. 226 (F.B.).
(105) (1939) R.L.R. 311.
(106) Ma Nyun Sein v. Maung Chan Mya,(1921) 11 LBR 124; (contd)

maintenance brought by or for the child against the father, ordination cannot, on the ratio in Maung Tin's case (supra) deprive the child of the statutory right, nor relieve the father of the duty created by the express provisions of the Criminal Procedure Code which applies independently of the personal law of the parties. The Criminal Procedure Code must over-ride the personal law when there is a conflict between the two (107). Lahiri pointed out that as a professional beggar or a minor school boy is not relieved of his liability to maintain his child, so a phongyi's poverty is also no answer to his child's claim for maintenance (108). In A.R.P.L. Firm v. U Po Kyaing (109) Ba U, J., observed that the view that a phongyi cannot evade the duty imposed on him by Sec. 488 of the Code of Criminal Procedure, whether the child was begotten before or after ordination is perfectly consistent with the Vinaya, in that it forbids a man to be ordained as a rahan when a maintenance order remains outstanding against him, and lays down that a rahan ceases to be such, once he has sexual intercourse.

---

(106) (Contd.) Ma Shwe The v. Manug Kan, (1923) 1 Ran. 430.
(107) Shwe Ton v. Tun Lin, (1916) 9 L.B.R. 220;
Maung Pwe v. U Inguya, (1918) 3 U.B.R. 91.
(108) Burma Laws Act 1898, s.13(1):- Where in any suit ... it is necessary to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, (a) the Buddhist Law in cases where the parties are Buddhists ... shall form the rule of decision, except in so far as such law has by enactment been altered or abolished ....; S.C. Lahiri, Burmese Buddhist Law, 50
(109) (1939) R.A.R. 311.

CHAPTER IX

PROPERTY OF THE MARRIAGE

1. Definitions.

Maung Ba, J., observed (1), "The husband and wife have to work for their common weal, and they are partners in life. In common parlance they are 'sharers of both good and bad.' The Dhammathats mentioned in section 208 to 214 of Kinwun Mingy's Digest enumerate the duties of the husband and wife towards each other. Among those duties we find that the husband must strive to acquire wealth and entrust it to the keeping of his wife, and that the wife must save the same. Possibly owing to the influence of Buddhism, the wife occupies a position of equalty with her husband and acquires an interest in the property of the marriage. The extent of that interest depends upon the origin of the property. The property of the marriage remains "joint" so long as the marriage subsists. As both are interested in that property, both will endeavour to protect it from waste and to effect an increase, if possible".

The Dhammathats frequently make use of the following terms (2):-

Payin or Atetpa is property possessed by either spouse before marriage, prenuptial property.

---

(1) Ma Paing v. Maung Shwe Hpaw, (1927) 5 Ran. 296 at 326 (F.B.)

(2) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.).

Lettetpwa is property acquired by either spouse or by both during the continuance of the marriage.

Hnapazon is postnuptial property, a species of which lettetpwa is the genus, property acquired by the joint efforts of both spouses.

Thinthi is the separate property of a spouse.

According to Major Sparks, joint property is of two kinds (3):-

(1) All profits arising since marriage from the employment or investment of the separate property of either.

(2) All property acquired by their mutual skill and industry.

This definition of the joint property was accepted by Sir John Jardine in Shwe Ngon v. Ma Min Dwe (4). It is pointed out that the word 'lettetpwa' is said by Major Sparks to mean 'obtained since marriage' but it has a wider connotation than the word 'hnapazon', which he translates as 'joint'. Major Sparks says that these words are used indiscriminately in the Dhammathats through the inaccuracy of the translator, and are not so used in the original "Sanskrit" (5). He says the same confusion occurs between 'thinthi' or 'separate' and payin (meaning "originally belonging".)

---

(3) Major Spark's Code, 210.

(4) (1882) S.J. 110 at 113.

(5) None of the terms applied to the various kinds of property of the marriage is of Sanskrit origin.

U Tha Gywe remarked that to turn to the original meaning of words derived from sanskrit might involve the introduction of rules of Hindu Law (6), and according to Maung Gyi, J.,(7), "Although we have borrowed many things from India, it does not follow that we should slavishly adhere to the meanings of the sanskrit terms in the Manu of the Hindus." Sir John Jardine expressed a useful warning that "it would behove the Courts to acquaint themselves with the present customs of the people and such more recent guides to custom as the Dhammavilasa, and the Mohavicchedani, which treats things from a Buddhist and somewhat modern point of view, leaving the classifications and technical terms of the Hindu law in the background. .... The writers of the last century were evidently using unfamiliar terms when they tried to define the Sanskrit or Pali words; and my impression is that many of them have no force at present as part of existing law". (8)

The terms payin, lettetpwa and hnapazon are loosely used in the texts and are nowhere exhaustively defined and it is clearly most desirable that the names given to the different kinds of property of a married couple should bear a fixed meaning (9) when the rights of the spouse in the property during the continuance of the marriage, its alienability, attachability, devolution on death, and partition on divorce are under consideration.

(6) U Tha Gywe, Treatise of Buddhist Law, II, 80.
(7) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran.322(F.B)
(8) Ma Lee v. Ma Pauk Pin, (1883) S.J. 225 at 231.
(9) O.H. Mootham, Burmese Buddhist Law, 9.

The classification of property of the marriage in the Dhammathats does not appear to be consistent or systematic and, therefore, an effort is made to reclassify it in the light of the decisions of the Courts in Burma. In C.T.P.V. Chettyar Firm and others v. Maung Tha Hlaing (10), Maung Gyi, J. observed, "To my mind, the proper main classification of the property belonging to a husband and wife is into payin (what is brought to the marriage by either or both), and lettetpwa (property acquired after the marriage in any way). The other terms used are mainly subdivisions of those two main classes." This broad classification was accepted by Maung Ba and Chari, JJ. in Ma Paing's case. (11) Maung Ba J. divided lettetpwa into (1) hnapazon (property acquired by the mutual skill and industry of the couple) and (2) ordinary lettetpwa (other property acquired during marriage). Chari, J., divided lettetpwa into (1) jointly acquired lettetpwa (property acquired during marriage by the joint exertion of the couple; i.e. by definition the same as Mg. Ba's hnapazon and (2) lettetpwa inherited or acquired by sole exertion (property acquired during marriage by inheritance or the special exertion of one of the couple) and based his classification on (a) the interest of each party (b) the power of alienation and (c) the attachability.

---

(10) (1925) 3 Ran. 322 (F.B.)
(11) (1927) 5 Ran. 296 (F.B.)

There is no essential difference between these classifications and that of Carr J., in C.T.P.V. Chetty Firm v. Maung Tha Hlaing (12) where he pointed out that too much weight cannot be attached to the use of these terms in any particular context.

The definitions might have been regarded as settled but for the dicta of Viscount Dunedin in U Pe V.U Mg.Mg. Kha (13). He was merely dealing with rights of a spouse in the other spouses' lettetpwa by succession, but he seems to have gone out of his way to assert that there were 3 species of property of a marriage couple, viz. payin, lettetpwa (which he subdivided into Ordinary lettetpwa and lettetpwa by succession) and hnapazon. He seems to have excluded hnapazon from lettetpwa.

Lettetpwa comprises all property which is acquired during marriage, either by particular exertion or by succession, the post nuptial property (14). Such property is held in common but the interests of one spouse may be equal or unequal. It is necessary to divide lettetpwa into (1) ordinary lettetpwa (acquired by individual exertion) and (2) inherited lettetpwa or lettetpwa by succession.

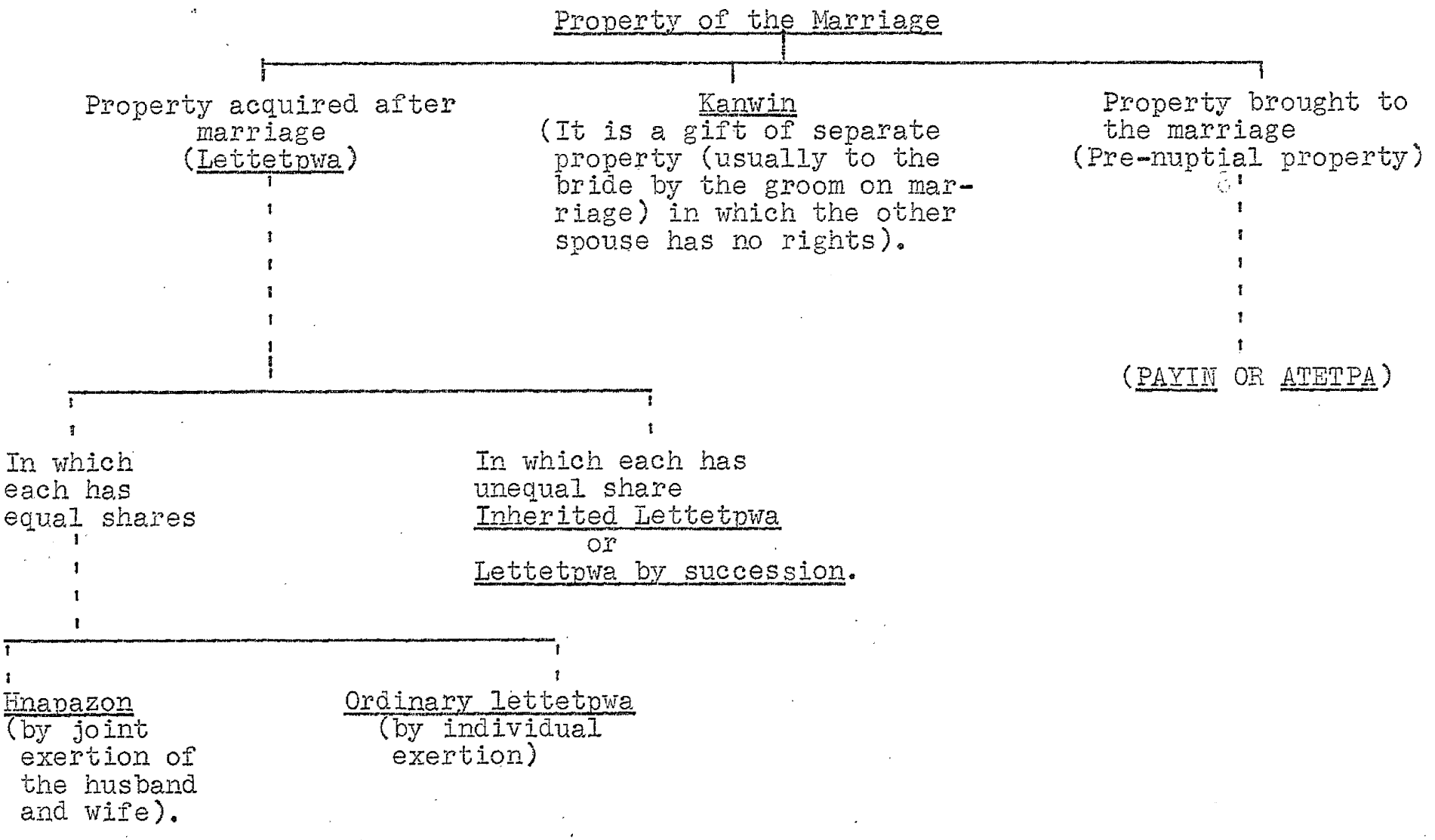
---

(12) (1925), 3 Ran. 322 (F.B.).

(13) (1932), 10 Ran. 261 (P.C.).

(14) R. Lingat, Les Regimes Matrimoneux, II, 18.

The table hereunder may, perhaps, help to explain these subdivisions better.



2. ORDINARY LETTETPWA

Ordinary lettetpwa includes the property acquired by the individual exertion of one spouse during the subsistence of the marriage. Each has a half share in ordinary lettetpwa of the marriage (15). In U Pe Mg Vu Mg. Mg. Kha (16) Lord Dunedin said,

"On partition lettetpwa goes two thirds to the spouse who actually made it or succeeded to it and one third to the other."

But the case dealt with the power of the wife to dispose of her interest in property inherited by her during coverture, that is to say in lettetpwa by succession, so that in so far as the above proposition deals with ordinary lettetpwa it is obiter.

Reported cases in which the wife was awarded a half share in the property acquired by the husband's individual skill and industry appear to be few. In Maung Shwe Lin v. Mi Nyein Byu (17), the earnings of a lawyer seem to have been claimed as ordinary lettetpwa acquired by individual skill and industry, but that point was not decided. U. May Oung advocated the extension of the rule of nissaya and nissita to the earnings of

---

(15) Ma Kin v. Mg. Po Sein, (1927) 6 Ran. 1; S.P.L.S. Chettyar Firm v. Ma Pu, (1936) 14 Ran. 697.

(16) (1932) 10 Ran. 261 (P.C.)

(17) (1878) S.J.L.B. 175.

artisans, salaried officers and professional men, on the basis that they are earned by the husband alone without the assistance of the wife (18). In other words, as the wife has played no part in the increase of the property of the marriage her share should be one-third as in all cases to which the nissaya and nissita (supporter and supported) applies. If that is a correct statement of the Law, one may ask why the wife of an official or business man, who is obliged to devote considerable time and skill to household management and social activities, so that she cannot acquire anything personally, should be so penalised. Why should she be regarded as a burden to be supported by the husband? The husband and wife are helpmeet to each other both in prosperity and in adversity; whereas the husband is obliged to earn a living by pursuing some business or avocation, the wife is obliged to attend to his home and his social activities so that both contribute, in their own fashion to the accumulation of the profits accruing to the husband in the course of his professional or business activities.

A text from Dhammathatkyaw cited in the Digest, runs as follows (19):-

"There certainly cannot be prosperity when both husband and wife lack goodness and virtue. It is only when both husband and wife are equally good and virtuous, and clever and wise,

---

(18) Leading cases on Buddhist Law, 61.

(19) Digest, II, sec. 237.

and when one is the helpmeet of the other, both trying to acquire property jointly and agreeably, that they are well and harmoniously matched like the soil and rain, or gold and emerald, and will assuredly obtain many children, have several slaves and attendants, and get more and more prosperous like the rising sun and the waxing moon".

A text from Manuvaṇṇanâ cited in the Digest is as follows (20):-

"If the husband and wife prove to be helpmeets to each other, both in prosperity and adversity, they shall divide the property equally between them if they desire to separate".

Therefore, it is submitted, that the property acquired during the subsistence of the marriage otherwise than by inheritance, though it may be the individual earning of only one spouse, is to be regarded in Burmese Buddhist law as if it were acquired by the couple by joint skill and industry and the property so acquired is to be divided equally between them if they desire to separate, as laid down in the Manuvaṇṇanâ. This view has the support of Lingat who says that U May Oung's view is generally rejected, and rightly, because the profits of the personal activity of a spouse are like the rents and profits of prenuptial property, which are equally divided between the spouses. This rule, if it is still applicable, ought to be restricted to capital acquisitions due to the skill or professional activity of a spouse i.e. to a source of enrichment

---

(20) Digest, II, Sec. 254.

analogous to that formerly resulting from royal bounty (21). This view received some support from the decision in The Official Assignee v. Ma Hnin San (22) in which the husband took out two life insurance policies during the continuance of the marriage and later died insolvent. The wife obtained one half of the money payable on the policies. It was contended that it must be presumed that the premia were paid out of the husband's salary and that the nissiya - nissito principle should be applied so that the wife would be entitled to one third only, but the Court held that there was no presumption as to the origin of the money paid as premia, and the rule of Burmese Buddhist Law of equal interest of husband and wife in all property acquired during coverture applied.

The authority or the subject of the profits and inherited lettetpwa is contained in section 3 of Book XII of the Manugye. The particular passage is reproduced in section 264 of the Kinwun Mingy's Digest Volume II. It declares in plain and unmistakable language that the profits accruing from payin property and property inherited from parents during marriage are lettetpwa and are to be divided as such. This rule is mentioned by Chan Toon (23), and approved by Sir J. Jardine in Shwe Ngon v. Ma Mi Min Dwe (24) and quoted in the first of his notes at page 3. The reason for the rule is thus stated:-

---

(21) R. Lingat. Les Regimes Matrimoniaux Chap. II, 19.
(22) (1940) Ran. 208 (F.B.).
(23) Principles of Burmese Buddhist Law, 44.
(24) (1882) S.J.L.B. 110.

"The principle appears to be that, as Sanford J. said in the case quoted by Mr. Jardine, husband and wife live together and manage their concerns together, and when the profits arise from the husband's separate property, the wife would be in charge or she would be managing the domestic affairs of the husband and administering to his domestic comfort and so giving him leisure to attend to his out-of-door business (and enabling him to perform it more efficiently). In short, the profits arising from separate property would be obtained by the joint exertions of the married couple." (25).

In Mi Myin v. Nga Twa (26), it was held that the profits of payin and atet property are lettetpwa which should be equally divided between husband and wife on divorce. Shaw J.C. challenged the correctness of Richardson's translation of the text and pointed out that as regards inherited lettetpwa, the point is not clear, as lettetpwa is of two kinds - namely ordinary lettetpwa and inherited lettetpwa. According to the text, the profits of lettetpwa are clearly lettetpwa, but the profits of each kind remain of the same kind (ဘဏ်း : ဘတို့း : according to its origin). The method of division prescribed in the Manugye for inherited property is twothirds to the spouse on whom it devolved and onethird to the other because it is considered that in respect of it the parties occupy the position of nissiyo and nissito. The question is what method of partition

---

(25) see in Mi Myin v. Nga Twe, (1906) II U.B.R. Divorce 19.
(26) (1906) II U.B.R. Divorce 19.

should be applied to the profits. Shaw J.C. said, "If the husband's share had actually come into his possession by partition, there would be no doubt it would be in the position of atet property. Husband and wife would be dealing with it together, or their joint labours would be such as to justify the profits being regarded as acquired equally by both. But here the inherited property had not been divided, and the question is whether the relation of nissiyo and nissito should be held to subsist with respect to the profits as well as to property itself."

It is respectfully submitted that the translations of Richardson and Shaw J.C. are incorrect and that the official translation of the Digest gives the correct approach to the Burmese text. In C.T.P.V. Chetty Firm's case (27) Maung Gyi, J. made a similar observation. In the circumstances it may be said that profits arising from the property given by the king to either spouse, from payin of each spouse and from inherited property of either spouse during coverture are ordinary lettetpwa in which the shares of the couple are equal. Profits from hnapazon may be treated similarly.

3. HNAPAZON.

Hnapazon is known as jointly acquired property and the interests of the husband and wife are equal in it (28).

---

(27) (1925) 3 Ran. 322 (F.B.).

(28) Mg. Po Sein v. Ma Pwa, (1897) P.J. 403; U Pe v. U Mg. Kha (1932), 10 Ran. 261 at 268 (P.C.).

All properties in which both the husband and the wife have an interest (whether the interest be equal or not) are "joint properties" while that portion of the joint property which has been acquired by their joint exertions and in which the interests are equal is called "jointly acquired property". (29). Such jointly acquired property is sometimes referred to in the reports as lettetpwa (30) or jointly acquired lettetpwa (31) and occassionally as hamapazon-lettetpwa (32).

4. KANWIN

Property set apart at the time of marriage by the bride-groom or his parents for the joint purposes of the married pair is termed kanwin (literally "room entered"). This was the definition given in Ma Hla Aung v. Ma E (33), but the expression applies also to gifts by the parents of the bride (34). U may Oung observed that presents received from other friends and relatives at the time of marriage though technically they may not be called kanwin, should be treated as such (35). Payin may, at the marriage, be declared kanwin

---

(29) U May Oung, "Leading Cases in Buddhist Law", 8.
(30) Mi Myin v. Nga Twe, (1906) II U.B.R. Divorce 19.
Mg. Po Aung v. Mg. Kha, (1928) 6 Ran. 247 (F.B.).
(31) Ma Ba We v. Mi Sa U (1903) 2 L.B.R. 174 (Heald J., in his order of reference in Ma Paing v. Mg. Shwe Hpaw, (1927) 5 Ran. 296 (F.B.)
(32) Ma Sein Nyo v. Ma Kywe, (1893) II U.B.R. (1892-96) 159.
(33) (1883) S.J. 219.
(34) Lu Gale v. Mg. Sein, (1911) 6 L.B.R. 16.
(35) Leading Cases on Buddhist Law 51-8.

and it then loses its former character (36); but if it is immoveable property, it can only be made kanwin by a duly registered deed (37). A gift of immoveable property as kanwin without a duly registered deed as required by the Transfer of Property Act is invalid (38). Kanwin property, for purposes of partition, is treated exactly like property acquired by the mutual skill and industry of the couple and the spouses always share equally (39). The general rule under Burmese Buddhist Law regarding the disposal of property given as kanwin by the birde's parents at the time of the marriage ceremony and delivered into her possession, is that even if she dies childless in her parent's house, the husband is entitled to inherit such property as against his parents in law (40).

5. INHERITED LETTETPWA OR LETTETPWA BY SUCCESSION.

Lettetpwa by succession is the property inherited by the husband or by the wife during coverture. The property inherited by the husband or the wife before the marriage is his or her payin. Inherited property can never become hnapazon. It is now settled law that where one of the couple inherits any property during coverture, that becomes property of the marriage. The rule of nissayo and nissita applies to this class of property, and the share of the spouse who inherits it is ~~always double of the other's share (41).~~

---

(36) Ma Ei Nyun v. Mg Tok Pyu, (1900), II U.B.R. B.L. Div. 39; Ma San Shwe v. Vulliappa Chetty, (1903) L.B.R.49.
(37) Ma E. Nyun v. Mg. Tok Pyu, (1900-01) II U.B.R. B.L.Div.39.
(38) Mg Shwe Kho v. Ma Mya, (1916) 9 B.L.T. 87.
(39) U. May Oung, "Leading Cases on Buddhist Law", 58.
(40) Lu Gale v. Mg. Sein, (1911) 6 L.B.R. 16.

always double of the other's share (41).

6. PAYIN

The distinction between payin and lettetpwa seems clear from Digest II, section 264. Payin is property what is brought to the marriage by either or both and lettetpwa is property acquired after marriage (42). Payin brought to a second marriage includes property acquired during the first marriage and also property acquired after the termination of the first marriage (43).

Lahiri states that 'payin' applies to the property brought to marriage by a bachelor or spinster and atetpa to that of a person previously married (44) but Jardine asserts that payin is more especially used in relation to eindaunggyis (45).

In the Digest (46), payin is used to designate the property brought to the marriage by persons previously married. In Nga Tun Baw v. Nga Kan (47) and in Ma Nwe v. Ma Sai Da (48),

---

(41) U Pe v. U Mg. Mg. Kha, Firm (1932) 10 Ran. 261 (P.C.).
(42) see C.T.P.V. Chetty v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.), where Mg. Gyi J. said "The proper main classification is into payin (what is brought to the marriage by either or both) and lettetpwa (property acquired after marriage)".
(43) Ma Nwe v. Ma Sai Da, (1929) 7, Ran. 578.
(44) Burmese Buddhist Law, 61.
(45) Notes on Buddhist Law, 33.
(46) Dig. II. see 257.
If the husband and wife, both of whom have previously been married, mutually desire to separate, let each take the property (payin) which he or she brought to the marriage.
(47) (1911) 4.B.L.T. 244.
(48) (1929) 7 Ran. 578.

the property of eindaunggyis is described as payin. Some confusion might have been avoided if the text-writers, judges, and jurists had uniformly used one of these terms and describe the pre-nuptial property of an eindaunggyi.

The following principles concerning payin property of a couple may be deduced from the Dhammathats and the decisions of the Court.

(1) Payin property is that possessed by either spouse before the marriage. It may be either animate or inanimate (49).

(2) Payin of a spouse consists of

(a) property inherited by that spouse from his or her parents before the marriage and

(b) property obtained by that spouse through individual exertion before the marriage (50).

(3) If Payin is exhausted during coverture, no claim for its restitution can be made when the marriage is dissolved (51).

(4) If both spouses brought payin to the marriage, payin of each will revert to the owner on divorce by mutual consent (52).

---

(49) Manugye Bk. XII, sec. 3;
Digest Vol. II - see 264.

(50) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 at 372(F.B.).

(51) Extracts from the Rasi, Manuvannana, and Panam - Digest II, sec. 254. "Each is entitled to the property which he or she brought to the marriage. No restitution can be claimed if such property is exhausted by use during their wedded life."

(52) Digest II sec. 254 all texts except Manugye.

(5) Payin which is divisible on divroce is that which still remains intact at that time. In Mi Myin's case (53), Shaw J.C. observed, "Mi San Shwe's case is not one of divroce. The question was as to the right of a husband to dispose of his payin during the subsistence of the marriage. It was held that it was not shown that a husband has no power to alienate his payin. The question is not affected by the rule of law which prescribes how payin is to be dealt with (when it still exists) at partition on divorce".

In Ma Paing v. Maung Shwe Hpaw and eight others (54), Chari J. also observed; "This shows that the interest of the wife, at partition on divroce, in the husband's payin is contingent on its existence as family property at divorce. The result is that when the husband has alienated his payin the wife loses her share in the specific property, though possibly in the final partition and taking of accounts, due allowance will be made for her interest in the payin alienated by her husband."

Payin of a spouse means the property he or she brought to the marriage less his or her ante-nuptial debts (55).

---

(53) Mi Myin v. Nga Twe, (1906) II U.B.R. Div. 19.

(54) (1927) 5 Ran. 296 (F.B.).

(55) N.A.V.R. Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 254 (F.B.); P.L.S.P. Chetty Firm v. U Mg. Nge, A.I.R. (1935) Ran. 399.

Payin property if declared as kanwin property at the time of marriage loses its character as payin and becomes kanwin (56), But, if the payin so declared is immoveable, the assurance must be in writing and duly registered (57).

The convertibility of payin is recognised in the Dhammathats (58), but the process is not explained, and the rules have been worked out by the courts.

Where payin is declared to be kanwin property at the time of marriage, it loses its character as payin and becomes kanwin (59). Payin does not change in character so long as the corpus remains unchanged (60), and it is not affected by a mere change of investments (61). Payin remains payin even though it may have been changed in form, provided it has not been merged entirely in the jointly acquired property.

---

(56) Ma E Nyun v. Mg. Tok Pyu, (1900) 2 U.B.R. (1897-01) 39.
Ma San Shwe v. Valliappa Chettyar. (1903) 10 B.L.R. 49.
(57) Mg. Shwe Kho v. Ma Mya, (1916) 9 B.L.T. 87.
(58) Dig. II 264; Dig. II see 257.
"The rule of partition on divroce when the nature of the property (payin) brought by either to the marriage has changed or has merged into jointly acquired property, is laid down above (see 257).
see 1257 Kungyalinga on "Divorce by Mutual Consent"
"let each take the property (payin) which he or she brought to the marriage, and that obtained from his or her parents, although the nature of such property may have changed by using for purpose of trade."
(59) Ma E. Nyun v. Mg. Tok Pyu, (1900) II U.B.R. (1897-1901) 39.
(60) Maung Nyan Gyi v. Ma Tok, II U.B.R. (1892-96) 43.
(61) Mg. Chit Kywe v. Mg. Pyo, (1895) II U.B.R. (1892-96) 184.

Change of form does not change its character so long as the payin can be identified (62).

If property is purchased with the payin of one spouse, it is presumed to become hnapazon of the marriage (63); but the presumption will be rebutted if ther is evidence to show that the payin, although it has changed its form, has not become merged in the jointly acquired property and so changed its character (64). Thus where the payin consisted of a fund invested in the mortgage of immoveable property, the fact that upon the redemption of the mortgage the fund was re-invested on a new mortgage was held not to alter the character of the fund (65).

If, however, the payin consists of immoveable property which is sold and subsequently bought back with moneys consisting in part of the proceeds of the original sale and in part of the payin of the other spouse, such property becomes the hnapazon of the marriage (66).

---

(62) Ma Ba We v. Mi Sa U, (1903) 2 L.B.R. 174 (F.B.); Ma Tah v. Ma Ka Yin, (1912) 6 B.L.T. 174

(63) Ma Ba We v. Mi Sa U, (1903) 2 L.B.R. 174 (F.B.); Ma Tah v. Ma Ka Yin, (1912) 6 B.L.T. 174. (Note. Jointly acquired property is in these cases referred to as lettetpwa.)

(64) Mg. Shwe Tha v. Ma Waing, (1921) II L.B.R. 48.

(65) Mg. Chit Kywe v. Mg. Pyo, (1895) II U.B.R. (1892-6) 184.

(66) Mg. Tun Gyaw v. Mg. Po Thwe, (1922) I.B.L.J. 160.

Where a man, whose payin consisted only of a squatter's right to a piece of land, obtained after marriage a lease thereof, it was held that the lease-hold interest in the land was hnapazon of the marriage, on the ground that it must be presumed in the circumstances that the lease was obtained as a result of the joint skill and industry of the married couple (67). But where a house is built on payin land with funds which are the joint property of the marriage, the house will remain payin in that the more valuable part of the property is the site and the maxim quicquid plantation solo, solo cedit is applicable (68).

Where both the husband and wife are eindaunggyis, they take no interest on marriage in each other's payin. In Ma Paing's case (69), it was held by Chari J. that each previously married spouse has an absolute vested interest in the whole of his or her atetpa. In Nga Tun Baw v. Nga Kan (70), it was held that an eindaunggyi wife can alienate the whole of her atetpa as she pleases, provided that she does not give it to her

---

(67) Ma Pu v. Mg Ngo, (1928) 6 Ran. 134.

(68) Ma San Shwe v. Vulliappa Chetty, (1903) 10B. L.R. 49; S.P.L.S. Chettyar Firm v. Ma Pu, (1936) 14 Ran. 697.

(69) Ma Paing v. Mg. Shwe Hpaw, (1927) 5 Ran. 296 (F.B.).

(70) (1910) 4 B.L.T. 244.

paramour. Attaṁsankhepa (71) and Panam (72) are authorities for this view. But, Heald, and Maung Ba JJ., relying on a text from Mânussika; "The wife shall not alienate even her own property without her husband's knowledge (73)", doubted its correctness. Mânussika's text is probably based on a principle now obsolete, but prevailing at the time of its compilation, that the husband is the lord of the wife. It cannot be preferred to the other texts mentioned because Attaṁsankhepa is the latest Dhammathat, written by the Kinwun Mingyi himself.

The prenuptial property of a previously married spouse reverts to its owner on divorce by mutual consent (74). The same rule applies where divorce is granted through the fault of one of the spouse (75). Burgess J.C., has suggested that in the case of a previously married woman there may be others besides herself to be considered, and that it would be unjust to make them suffer for her misconduct. The reason for this

---

(71) see: 406.

(72) Digest II sec. 252 -
"but except as herein provided he shall not alienate the property brought by the wife to the marriage; over such property she alone has the right to alienate as she pleases."

(73) Digest II, sec: 252.

(74) Digest II sec. 257.

(75) Mg. Yin Maung v. Ma So, (1879) II U.B.R. (1897-1901) 34; Digest II - sec. 259:
"If the divorce is in consequence of the wife's adultery, let the property originally brought to the marriage be taken by the party who brought it"; Attaṁsakhepa; O.H. Mootham, "Burmese Buddhist Law", 45.
U Gaung points out that there is no relevant text in the other Dhammathats; (Digest II, sec. 259).

special treatment appears to be that "in the case of a first marriage, there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interests also have to be considered." (76)

7. PERSONAL PROPERTY.

Although the Dhammathats speak about personal property of the husband and the wife, Cittara is the only text that gives its definition. The husband's personal property are personal attendants, elephants, ponies, sword, and men's wearing apparel, such as paso (loin cloth), jacket, and turban (77); whereas, the wife's personal property are wearing apparel such as tamein (skirt), long sleeved coat, jacket, belt, and weaving and spinning appliances (78). Jewellery which the husband has made for the use of his wife is not necessarily her sole property, such jewellery is normally regarded by both husband and wife as their joint property. If it is alleged that it was his intention to give her the jewels so that they should be her sole property, this must be clearly proved (79).

---

(76) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.) at 346, per Chair J.

(77) Dig. II Sec. 242.

(78) Dig. II Sec. 243.

(79) Ma Yin U. v. Ma Lun, (1907) 1 B.L.T. 11.

(i) Minbe is the property given by the king or the government solely to one spouse. The rule of nissaya and nissita applies to such property (80). Profits arising from it are treated as ordinary lettetpwa.

(ii) Thinthi

Major Sparks regarded thinthi as the separate property of either spouse. Its distinguishing feature, according to him, is that the spouse who is not the owner has no power whatsoever over it (81). Thinthi has been defined by him to include the following property (82):-

(1) What belonged to either before marriage.

(2) What has been given especially to either since marriage.

(3) What has come into the possession of either by inheritance from his or her own family since marriage and

(4) Clothes, jewels and ornaments.

In giving this definition of the term thinthi, Major Sparks relied upon section 81 of Book X of the Manugye. But the Dhammathats, including Manugye relied upon by Major Sparks, do not speak of thinthi in connection with husband and wife. They broadly define thinthi as property which the children could hold

---

(80) Manugye Bk. 10, Sec. 3.

(81) Sparks' Code 16.

(82) Jardine's Notes 1 para. 39.

as against their parents and which on the death of the parents could not be treated for purposes of inheritance and division as part of the estate of the parents (83). It is, therefore, respectfully submitted that in speaking of thinthi as property belonging to the husband or the wife, he is repudiating the authority he himself had cited. Moreover, the properties mentioned in items (1) to (3) above are identical with payin, minbe, and lettetpwa by succession respectively. Consequently, it cannot be said that the spouse other than the one who brought it to the marriage or acquired it has no interest in it. It is now settled law that a spouse has a one third vested share in the inherited property of the other from the date on which it is inherited (84). This being so, it is submitted that no useful purpose can now be served by describing any property of either spouse as thinthi or a separate property of the property mentioned by Major Sparks in item (4) above, clothes correspond with the personal property of the spouses mentioned in sections 242 and 243 of the Kinwun Mingyi's Digest, Volume II, but jewels and ornaments which the husband has made for the wife's use are normally regarded not as separate property of the latter, but as the joint property of the couple. The partition of thinthi in Burmese Law is thus described by U. E. Maung (85):- "The various kinds of thinthi spoken of by the dhammathats bear semblence to the exceptions grafted on the earlier Roman rule of proprietary incapacity of the filicis familias; the

---

(83) Manugye, Vol. X, sec. 81; Dig. I, 119-136.
(84) C.T.P.V. Chetty Firm v. Mg Tha Hlaing, (1925) 3 Ran. 322, (F.B.).
(85) Burmese Buddhist Law, 62-63.

Dhammathats broadly defined thinthi as property which the children could hold as against their parents and which on the death of their parents could not be treated for purposes of inheritance and division as part of the estate of the parents". Hence, it may be said that no property in which either husband or wife, as such, have an interest can properly be described as thinthi.

8. THE RULE OF NISSAYA AND NISSITA.

The Dhammathats justify unequal shares in respect of payin and certain kinds of lettetpwa by pointing to the fact that one of the couple alone is instrumental in the acquisition of these classes of property.

The Burman Buddhist husband and wife have each an interest in the property of the other and the party through whom the property is acquired is given a larger share. A person who brings much property to the marriage or who is mainly instrumental in the acquisition of the joint property is called the nissaya (supporter) while the other is called the nissita (dependant). If the husband alone is instrumental in the acquisition of property while the wife is maintained by him, then he shall be deemed the supporter (nissaya) and she the dependant (nissita). If the wife is the principal acquirer of the property, while the husband depends on her, then she becomes the supporter and he the dependant (86). The supporter gets more than the dependant. If one spouse inherits any property during marriage the other has a third share in the same.

(86) Digest II, sec. 254.

Nissaya and Nissita appear to be corruptions of the Pali 'Nissayo' "that on which anything depends" and 'Nissito' "dependent". The true Burmese equivalent is အာမိပျုရှင် (ahmi-pyu-shin) for nissaya and အာမိပျုသူ or မပျုသူ (ahmipyu-shin or ma-pyu-thu.) for nissita and it is so used in some passages of Manugye (87).

This rule of Nissaya and Nissita is quite simple and it is applied in the following cases:-

(a) When the property is given specially to one spouse by the king or government,

(b) When one spouse has acquired property during coverture by his or her own skill and labour; and

(c) When one spouse brings much property to the marriage and the other little or none and where neither of the parties has been married before or when one of the spouses has been married before and brings much inherited property to the marriage and the other none and when both spouses bring payin to the marriage and are virgin couple (88).

The same rule applies to any inherited property by either spouse during the subsistence of the marriage (89).

---

(87) Bk. III, sec. 3; as pointed out in Mi Myin v. Nga Twe (1906) II U.B.R. Divroce 19.

(88) O.H. Mootham, "Burmese Buddhist Law", 43-44; Ma Ngwe Hnit v. Mg Po Hmu, (1921) 11 L.B.R. 52; Mg San Bwint v. Ma Than Sein, (1948) B.L.R. 1.

(89) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322; Ma Ngwe Hnit v. Mg. Po Hmu, (1921) 11 L.B.R. 52.

9. WHAT DOES "PROPERTY OF THE MARRIAGE" COMPRISE?

What is comprised in the phrase 'property of the marriage, what are the rights of the spouses in the different kinds of property of the marriage, and when may they be exercised are questions to which, at different times, the Anglo-Burman courts have given different answers. The present position cannot be stated with certainty.

The property of the marriage certainly includes the hnapazon, ordinary lettetpwa and inherited lettetpwa or lettetpwa by succession (90). It is less certain whether the payin of each spouse can be regarded as included in it.

Though, in case of divroce by mutual consent, the ten Dhammathats digested in section 254 of volume II of the Digest generally apportion the property by giving two thirds to the supporter (nissaya) and one third to the dependant (nissita), two of them, Rasi and Panam give each spouse the right to take back his or her payin. It is of special interest that Manugye does not recognise this right, because the extract from Manugye in section 257 of the Digest, which deals with partition of property on divorce by mutual consent between previously married spouses, allots to each of them the payin brought to the marriage. The same rule is found in all the extracts digested in section 257, except Waru, who is silent on the point.

---

(90) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.).

From Manugye XII, 3, and section 254 of Volume II of the Digest it would seem to follow that in the case of a 'virgin' couple, payin is to be included in the property of the marriage.

From sections 261 and 262, which deal with the cases when the husband only, and the wife only, were previously married, it would seem that in each cases,the rule applicable to eindaunggyis should apply. But the courts have not applied that rule. In Ma E Nyun v. Mg. Tok Pyu (91) and in Mg. Ngwe Hnit v. Mg. Po Hmo (92) the rules applicable to a 'virgin couple' were followed in cases where one spouse only was eindaunggyi. In the former case, it was said that there was no relevant lax, and that it was equitable that a wife who married as a spinster should be more favourably treated than a wife who had been previously married. This decision was relied on in the later case, and it was said that there was no provision in the Dhammathats for the case where the wife had not but the husband had been previously married. On divorce by mutual consent, the wife receives two thirds of the husband's payin.

In Mg. Yin Mg. v. Ma Soe (93) on the re-marriage of the same spouses after divorce the parties were treated as though they had not previously been married.

---

(91) (1900) II U.B.R. (1897-1901) 39.

(92) (1921) II L.B.R., 52.

(93) (1897-01) 2 U.B.R., 34.

In the case of Ma San Shwe v. Vulliappa Chetty ,(94) ,it was held that payin did not form part of the joint property of the marriage and could ~~not~~ at any time be freely alienated by the party to whom it belonged. The contrary view was taken in Mg. Po Nyun v. Ma Saw Tin (95) by a divisional court which regarded the wife as acquiring an interest in all property brought by her husband to the marriage. In neither of these cases, however, was any distinction made between the marriage of a virgin couple and of eindaunggyis. Attention was first drawn to the importance of this distinction in the case of C.T.P.V. Chetty Firm v. Maung Tha Hlaing (96), in which it was pointed out that Burmese sentiment regarded the union of a couple, neither of whom had been previously married, as being more perfect than any other marriage, and that the Dhammathats indicated that in the case of such a marriage not only property acquired after marriage but also property brought to the marriage was joint. 'The rules' (i.e. those contained in the Dhammathats) said Carr J., -

"Cover all property, whether acquired before or after marriage, of both parties. They thus disclose a very strong

---

(94) (1903), 10 B.L.R. 49.

(95) (1925), 3 Ran. ~~160~~ 162 ~~(F.B.)~~.

(96) (1925), 3 Ran. 322 (F.B.).

community of interest in the case of a first marriage and indicate that all property is joint, though the respective interests may vary in amount". (97).

Where, however, one or both of the parties to a marriage has already been married different considerations may apply, and there is some authority for stating that in such circumstances either spouse may freely dispose of his or her own payin (98). The reason for this distinction is that:-

"In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But where either or both has been married before, it is likely that there will be children of the first marriage and their interests have also be be considered. That is a very good reason for not giving to each spouse the same rights in the payin property of the other as are given on a first marriage". (99).

This distinction appears to have been overlooked or disregarded in recent cases (100) in which the court had to consider the respective interests of the parties in the property of the marriage where a husband had two wives. In these cases Mg. Po Nyun's case (101) (so far as the point now under consideration is concerned) was followed, and it was assumed,

---

(97) C.T.P.V. Chetty v. Mg. Tha Hlaing, (1925), 3 Ran. 322 (F.B.) at 343.
(98) Nga Tun Baw v. Nga Kan, (1911) 4 B.L.T. 244.
(99) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.)
(100) S.P.L.S. Chettyar Firm v. Ma Pu, (1936) 14 Ran. 697; Daw Hla Ohn v. Ma Nyun, (1937) Ran. 410.
(101) (1925) 3 Ran. 160.

for the purpose of ascertaining the second wife's share, that she had a vested interest in property acquired by the husband during the first coverture, that is to say in payin brought by him to the second marriage.

In Mg. San Bwint v. Ma Than Sein (102), Ba U, C.J. said that, in relying on the absence of interests of ixisting children, to justify the distinction of the payin in the property of the marriage of a 'virgin couple', and its exclusion in the case of a previously married couple, Carr J. had gone entirely wrong, and had overlooked, in the latter case, the rights of children of a previous marriage (103). He further said (104), "If an eindaunggyi who has children by his previous marriage marries a spinster then his children acquire a vested right in the property acquired by their father and deceased mother on the re-marriage of their father. Therefore their share will not be subject to partition on the division of the atetpa property between their father and his wife, their stepmother, on divroce by mutual consent. If the eindaunggyi has no children by his previous marriage then the whole of his atetpa property will be subject to partition. The same rule applies in the case of an eindaunggyi marrying a bachelor."

---

(102) (1948) B.L.R. 1.

(103) Chari J. in C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.)

(104) (1948) B.L.R. 1 at 14.

It was held that on divorce by mutual consent between a Burmese Buddhist couple, one of whom had been previously married and the other had not been so married, the atetpa property of the party previously married should be divided on the principle of nissaya and nissita, provided that no property had been acquired by the couple after their marriage, as this is exactly what sections 261 and 262 of the Digest, volume II, and section 396 of the Attasankhepa say.

It would appear, therefore, that the trend of authority is to include payin in the property of the marriage.

10. SHARES IN THE PROPERTY OF THE MARRIAGE.

Husband and wife have each a half share in the hnapazon property (105) and 'ordinary lettetpwa (106) of the marriage.

As regards 'lettetpwa by succession' the party through whom such property is acquired has a twothirds share and the other party a onethird share therein (107). Whether it can correctly be said in every case that the payin of either party is included in the property of the marriage is, however, questionable.

When a husband having two wives inherits property after the second marriage such property is lettetpwa by succession,

---

(105) Mg. Po Sein v. Ma Pwa, (1897), P.J. 403; U Pe v. U Maung Maung Kha, (1932) 10 Ran. 261 (P.C.).

(106) Ma Kin v. Mg. Po Sein, (1927) 6 Ran. 1.

(107) S.P.L.S. Chetty& Firm v. Ma Pu, (1936) 14 Ran. 697; C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.).

and the husband's interest therein is two-thirds. The interests of the wives jointly is one-third and, as they are of equal status, each acquires a vested interest in one-sixth (108).

Similarly in the case of ordinary lettetpwa acquired by a husband with two wives, his interest therein is one half and that of each of his wives is one-fourth (109).

11. THE RIGHT OF MANAGEMENT.

It is true that the Dhammathats mentioned the husband as the Lord of his wife (110). According to the text from Cittara, a wife who has no respect for her husband is liable to be punished; it further recognized that the husband is naturally superior to his wife and if the conduct of the husband is irreprochable, his wife shall obey him, even though he may be a hunter or fisherman by trade (111).

The Dhammathats (112) clearly gave the husband unfettered control not only over the property of the wife including that acquired by her personal skill and labour, but also over her

---

(108) C.T.P.V. Chetty Firm v. Mg. Tha Hlaing, (1925) 3 Ran. 322 (F.B.).

(109) S.P.L.S. Chettyar Firm v. Ma Pu, (1936) 14 Ran. 697.

(110) Digest II, Section 251.

(111) Digest II, Section 213.

(112) Digest II, Section 251.

person. The following illustration in Râsi will explain the old saying that the wife is in the power of her husband:

"The teachings of the Buddha contain the following story which supports the rule of the Dhammathat. One day, King Vessantarâ gave away his Queen Maddi Devi, having already given away his children the day previous. She did not show the least sign of anger, sorrow, or injured feeling, but with a natural and serene countenance looked at her lord and expressed herself thus:-

"My Lord and King! You have every right to give me away to whomsoever you please. The parent to whom I am given away may make me a slave, or sell me to another, or kill me. I am your first married wife and you have complete control over me, and, in giving away your wife, of whom you have an absolute right of disposal, I shall not in any way be provoked. So do with me as you please."

According to the Manugye, (113) she who takes her husband's orders, disputes not his authority but complies with his wishes is an ideal wife. Again, Manugye (114), while treating of gifts, contains the following passage:

"If the husband, without the knowledge of the wife, shall make a present to another of a portion of the property common to both, and the receiver be not his lesser, wife or concubine,

---

(113) Book V, section 131.

(114) Manugye, Book VIII, section 3.

let it be kept as it was given. The wife shall not say: "It is the property of the husband and wife, I did not know of the gift." She shall not take it back. Why is this? Because the husband is Lord of the wife."

On the other hand, in case of the wife making a gift without the knowledge of her husband, whether it be to her paramour or not, she has no right to confer a gift unknown to her husband: if the husband shall take it back, let him have it. This is only said of things equally the property of both." (115).

However, the courts in Burma give recognition to the husband's absolute right of control over the joint property and person of the wife only in a limited sense. In Maung Ko v. Ma Me (116), the Special Court held that so long as the marriage subsists, the Court cannot decree an absolute dominion over the joint property to either husband or wife, but that the husband rather than the wife is entitled to possession thereof in trust for both. This principle was recognised in Nga Kan Za v. Mi Le (117), wherein it was held that the wife could not claim exclusive possession of any part of the joint property.

In Ma Thu v. Ma Bu (118), Fulton, J. explained in what sense the husband should be regarded as the lord of his wife,

---

(115) Manugye, Volume VIII, section 3.
(116) (1874) S.J.19.
(117) (1882) S.J. 126.
(118) (1891) S.J. 578.

observing inter-alia: "It cannot be disputed that in many instances, the husband manages the business of the family with the assent of his wife, express or implied, and where this is the case, sales effected by him will bind her. He is said to be the lord of the wife, but I think this only means that she ought to be guided by his authority in matters in which his conduct is reasonable and proper. It does not seem to imply that he is absolute master of her property."

Hence U Chan Toon (119) said, "No doubt in the general management, the control of the household and of the children and family property will be vested in the husband, but this power may not be exercised arbitarily, and without consultation with the wife; and the usage of the people at the present time is such as to regard the wife as an equal partner in the family interests. It not infrequently happens that she is the bread winner of the family, in which case her wishes and opinion will be of paramount importance." The action of King Wethandaya, who without his wife's consent is said to have given away his property and finally his children to the Brahmins, can hardly now be relied as a precedent in support of a sale by the husband, for a gift for religious or charitable purposes and appears to be governed by special considerations (120). Even the husband's right to assault

---

(119) Principles of Buddhist Law, 41-42.

(120) by Fulton J. in Ma Thu v. Ma Bu, (1891) S.J. 578.

his wife by way of chastisement is now regarded as obsolete and it cannot be tolerated, because in the present state of society the provisions of the Penal Code would prevent the exercise of this right (121). The text dealing with the lordship of the husband over the wife may be an echo of the rules of archaic Hindu Law in which the wife occupied an inferior position (122). Possibly owing to the influence of Buddhism the wife has attained a position of equality with her husband and acquired a comparable interest in the property of the marriage (123). Certainly the texts which impose on the wife blind submission to the acts of the husband today are not honoured by observance in the Courts or in Burmese Society.

Therefore, the saying that the husband is lord of the wife is true only in a limited sense (124), and where religious offerings are concerned, his supremacy is distinctly recognised. But in so far as interests in the property of the marriage are concerned, the husband and wife seem almost on terms of equality. To have recourse, then, to Hindu Law for the purpose of establishing the husband's power over the joint

---

(121) Ma Thu v. Ma Bu, (1891) S.J. 578.

(122) Ma Paing v. Mg. Shwe Hpaw, (1927) 5 Ran. 296 (F.B.)

(123) Ma Paing v. Mg. Shwe Hpaw, (1927) 5 Ran. 296 (F.B.)

(124) Ma Thu v. Ma Bu, (1891) S.J. 578.

property would be to endeavour to arrest the progress which has been made in Burma towards the emancipation of women by having recourse to a system based on less liberal and wholly inconsistent to ideas (125).

12. WOMEN'S RIGHTS IN PROPERTY.

Burmese Buddhist Law gives extensive rights to women in relation to ownership of property. It not only recognizes her separate property, but also her vested interest in the property brought by her husband to the marriage, or acquired by him singly or jointly with her during coverture. On the death of her husband, she becomes the principal heir and inherits the entire estate subject only to the claim to one quarter share by the privileged child known as the orasa (126). Thus nothing comparable to the common interests of husband and wife is known either in Hindu or Mohammedan Law. Before the recent enactment of the Hindu Code, Hindu wives had their stridhana, but, for the most part their rights were restricted to maintenance out of property vested in males; Mohamedan wives frequently had property of their own and had indefeasible rights of inheritance to a portion of the husband's estate (127).

---

(125) Ma Thu v. Ma Bu, (1891) S.J. 578.

(126) Ma Sein Ton & two v. Ma Son, (1915) 8 L.B.R. 501 (F.B.).

(127) Ma Thu v. Ma Bu, (1891) S.J. 578.

13. INTERESTS OF THE SPOUSES IN THE PROPERTY OF THE MARRIAGE.

In a joint tenancy, on the death of a co-owner his interest in the estate, passes to the survivor. But in a tenancy in common, the co-owners are entitled to rents and profits in proportion to their respective shares, and on the death of one of them, his share and interest in the estate passes to his heirs and not to his surviving co-owners. In that the husband and wife under Burmese Buddhist Law are now regarded as tenants in common, the surviving spouse must obtain a Succession Certificate or letters of Administration in respect of the deceased's estate before a decree can be granted in respect of a debt due to the deceased (128).

Both the husband and the wife have during the continuance of the marriage an interest (not necessarily the same) in the property of the marriage (129). Such property is held by the husband and wife as tenants in common and not as joint tenants, and during the subsistence of the marriage each has a vested right to his or her share therein (130).

The common ownership by the husband and wife of the property of the marriage is a characteristic feature of the law relating to Burmese Buddhists. It may have had its origin in the fact that among the Burmese the husband and wife ordinarily manage their concerns together; and it is not unusual to find

---

(128) Mg. Po Htwa v. Ma Ngwe Zin, (1937) Ran. 396.

(129) O.H. Mootham, "Burmese Buddhist Law 2".

(130) N.A.V.R. Chettiyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524. (F.B.).

that the wife often takes a more active part in business than the husband, and that even when their profits arise from the separate property or from the separate business or trade of the husband, the wife is in charge of the property (131). A possible remoter origin of this institution is a compromise between the patriarchal law of the Burmese invaders and the matriarchal law of the Austro-Asiatic inhabitants of Burma before the Burmese invasions.

The nature of the common interest of the husband and wife in the property of marriage has been the subject of a marked difference of judicial opinion, and appears to have been misunderstood by the judges and writers of the British period, as there is no comparable institution in English Law. Prior to the decision of the Privy Council in U Pe v. U Maung Maung Kha, (132) on the nature and extent of the proprietary rights of the spouses at Burmese Customary Law, the current of decisions ending with Ma Paing v. Maung Shwe Hpaw, (133) and U Po U v. Ma Tok Gyi (134) enunciates the proposition that at Burmese Customary Law the spouses are joint tenants; whilst the other line of cases ending with N.A.V.R. Chettyar Firm v. Maung Than Daing (135) lays down the proposition accepted by the Privy Council that the spouses are not joint tenants but tenants in common.

---

(131) Mo Kyin v. Ma Saung, (1874) S.J. 27.
(132) (1932) 10 Ran. 261 (P.C.)
(133) (1927) 5 Ran. 296 (F.B.).
(134) (1929) 7 Ran. 374 (F.B.).
(135) (1931) 9 Ran. 524. (F.B.)

14. THE DOCTRINE OF PARTNERSHIP.

The arguments in favour of the joint tenancy system premise that at Burmese Customary Law, the husband and wife are, in respect of property to which either or both can lay a claim, in the position of partners, in a partnership which can be dissolved only on death of either or by divorce. The theory that a Burmese Buddhist husband and wife are partners was first conceived in Maung Ko v. Ma Me. (136), where it was held that neither husband nor wife was entitled to dominion over the property of the marriage during its subsistence. The Court decreed the husband's claim for possession as against his wife, but the husband was to hold the property in trust for both. That decision, it is submitted, indirectly asserted the theory of partnership between the parties to a Buddhist marriage. Some eight years later, Sir John Jardine said (137); "With respect to the management and acquisition of property, the Buddhist Law while distinctly recognizing the status, treats the husband and wife as if they were partners in the profits, unless perhaps the woman lives and has an establishment separate from her husband and takes no share either in the management of his business or in his household affaris." He then gave express recognition to the partnership theory in Ma Hla Aung v. Ma E (138) wherein he observed in unmistakable

---

(136) (1874) S.J. 19.

(137) Notes on the Incidents of Marriage, Notes 1, para. 37.

(138) (1883) S.J. 219 at 220.

terms: "The Buddhist Law favours the equality of the sexes and in many ways treats marriage as creating a partnership in goods." This view was accepted by the chief court of lower Burma in Maung Twe and three v. Ramen Chetty (139).

In Upper Burma, the theory of partnership was upheld in Ma Me v. Maung Gyi, (140) and U Guna v. U. Kyaw Gaung, (141). It is respectfully submitted that, as observed by U E Maung (142), the decision in the former case was self-contradictory in that it recognized the creditor's right to attach and sell the husband's share and interest in the joint property before the partnership was dissolved by death or divroce. In the latter case, Burgess, J.C., for the first time formulated the theory of tenancy in common without abandoning the theory of partnership. Influenced no doubt by these pronouncements and decisions, the Privy Council in Ma Thaung v. Ma Than (143) stated, "It is to be noted that in the Burmese social and legal system, the wife is to all intents and purposes, a partner."

The decision of the Full Bench of the Chief Court of Lower Burma in Ma Shwet v. Ma Kyu (144) is generally cited as

---

(139) (1899) I.L.B.R. II.

(140) (1892-96) II U.B.R. 45.

(141) (1892-96) II U.B.R. 204.

(142) Burmese Buddhist Law, 49.

(143) (1923) 5 Ran. 175 at 178(P.C.).

(144) (1905) III L.B.R. 66 (F.B.).

negativing the proposition that at Burmese Buddhist Law the husband and the wife are partners. The Full Bench laid down that the husband may lawfully alienate his share and interest in the joint property of the marriage, without his wife's consent and during the coverture, thereby over-ruling the decision in Maung Weik v. Maung Shwe Lu (145) to the contrary. Such a decision, necessarily negatives a joint tenancy, resultant on a partnership indissoluble except by death or on divorce.

The rule thus laid down in Ma Shwe U v. Maung Kyu (146) was followed without question for over twenty years; but in 1927, a Full Bench of the High Court overruled it in Ma Paing v. Maung Shwe Hpaw and eight others (147) and definitely formulated the doctrine of partnership as extending to Burmese Buddhist husband and wife. The Full Bench discussed all available authorities touching the point and held as follows:-

(1) That at Burmese Buddhist Law, in respect of the property of the marriage whether that property be the payin property of either party or lettetpwa property of the marriage, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa is partnership property.

---

(145) (1902) I L.B.R. 184.

(146) (1905) III L.B.R. 66 (F.B.).

(147) (1927) 5 Ran. 296 (F.B.).

(2) That the partnership between husband and wife is dissolved only by death or divorce and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce.

(3) That where the interest of a husband in property which was either payin brought by him to the marriage or was jointly acquired lettetpwa, is during the subsistence of the marriage, sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, the buyer of that interest does not acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it.

(4) That either husband or wife or both may represent the partnership in dealing with the third person and that a presumption ordinarily arises that debts contracted by either party bind the partnership and are recoverable out of the partnership property; and

(5) That there is a presumption that a suit brought against either of the partnership, and that in such a suit, a partner who is not joined as a party to the suit is represented by the partner who is joined as a party and a decree against either partner can ordinarily be executed against any partnership property, provided the decree was obtained against that spouse as representing the partnership.

This decision left a creditor of an ante-nuptial debt without any remedy during the subsistence of the marriage. He could not deal with a married Burman unless he was certain that the wife would be held to be party to the contract. Its correctness was therefore, doubted by Pratt and Otter JJ. in U Po U v. Ma Tok Gyi (148). In that case the superior wife sought a declaration that deeds of gift by the husband of part of the property of the marriage to a lesser wife was void; the bench before whom the case came on appeal, pointed out that in Ma Paing's case (sup.) Ma Shwe U v. Ma Kyu (149), which would support the alienation to the extent of the husband's interest, had not been expressly overruled. Nevertheless, it would seem to follow from the 2nd and 3rd propositions in Ma Paing's case set out above, that the gifts were inoperative while the marriage subsisted. In the order of reference to a Full Bench, Pratt, J., said, "Although the parties to a marriage are partners, it is obvious that the partnership can only be applied with limitations." But the learned Judges who decided the reference were unable to depart from the views expressed in Ma Paing's case and they re-affirmed the theory of partnership by holding that a deed or gift executed by a Buddhist husband without his wife's consent of part of the joint property of the marriage was wholly void and conveyed no

---

(148) (1929) 7 Ran. 374 at 377 (F.B.).

(149) (1905) 3 L.B.R. 66 (F.B.).

title to the donee in respect of the property which it purported to convey.

15. TENANCY IN COMMON.

Four years later, in N.A.V.R. Chettyar Firm v. Maung Than Daing (150), Das, J., before whom the case was argued on second appeal again doubted the correctness of the decision in Ma Paing's case (151) and referred for the decision by a Full Bench whether the joint property acquired by the husband and wife, possibly out of the property brought to the marriage by the couple is liable to pay the debt contracted by either of them before the marriage. At the hearing of the reference, the Full Bench (Page, C.J., Das and Maung Ba, JJ.), being in doubt whether Ma Paing's case was rightly decided, propounded for determination by a special Bench interalia whether the principles of law enunciated in that case are correct. The decision in Ma Paing's case was over-ruled. Page, C.J. approved the dictum of U May Oung (152) that 'the conception of a relationship akin to that of trading partners does not appear anywhere in the texts or in the general literature of the country, and pushed too far, may lead to complications undreamt of by the older jurists, and after discussing all previous authorities on the point, observed that Ma Paing's case laid

---

(150) (1931) 9 Ran. 524 (F.B.).
(151) (1927) 5 Ran. 296 (F.B.).
(152) U May Oung, Leading Cases on Buddhist Law; 52

down propositions of law which could not be justified under the Dhammathats and which ran counter to a cursus curiae in Upper and Lower Burma of nearly half a century. Page, C.J. in the course of his judgement pointed out that: (153)

"Burman Buddhists were in the habit of contracting marriages centuries before the law of partnership was in existence or contemplation, and there is no text relating to the customary law of Burman Buddhists that could be cited to give colour to the notion that a Burmese Buddhist marriage is analagous to, if not identical with, an ordinary business partnership. The doctrine appears to have been evolved by the courts as providing a way of escape from impasse to which it was thought that a rigid adherence to the customary law that governed a Burmese Buddhist marriage would necessarily lead."

The learned Chief Justice goes on, "To carry on business together is one thing, to live together as man and wife is something very different. Partnership is merely a form of agency, and, no doubt, a Burmese Buddhist husband and wife not infrequently carry on a business together, but to lay down that a Burmese Buddhist husband and wife are merely business partners as defined in the Indian Contract Act is to state a proposition which appears to me to be unsustainable in law, and incorrect in fact." In holding that the husband and wife in a Buddhist marriage do not hold the property as joint

---

(153) (1931) 9 Ran. 524 (F.B.) at 534.

tenants but as tenants in common, the Chief Justice remarked: 'This obviously, must be so, for on the death of husband or wife, the other spouse takes the interest of the deceased in the joint property by inheritance, and not by survivorship, and it seems to me that the fallacy that underlies the reasoning upon which Ma Paing's was based, if I may venture to say so, is that it leaves altogether out of account the fact that the parties prior to the marriage possessed an interest in the property that they severally brought to the marriage. It will be admitted on all hands, and the learned Judges who decided Ma Paing's case would have conceded, that the husband or wife or both of them, if they brought property to the marriage, possessed a definite and vested interest in such property at the time when the marriage took place: it follows therefore, if the legal position of parties to the marriage was correctly stated in Ma Paing's case, that on the marriage taking place the parties automatically become divested in toto of the definite vested interest that up till the happening of that event they had possessed. Such a proposition appears to me opposed alike to good sense and good law.' (154)

Carr J., (155) states, "In particular I think that the learned Judges erred in attempting to apply the law of partnership to the question. There are, of course, some analogies between a Burmese husband and wife in relation to their

---

(154) N.A.V.R. Chettyar Firm v. Maung Than Daing, (1931) 9 Ran. 524 at 537 and 538 (F.B.)

(155) N.A.V.R. Chettyar Firm v. Maung Than Daing, (1931) 9 Ran. 524 at 554 (F.B.).

property and a commercial partnership, but there are also many differences, and it is in my opinion entirely wrong to make any attempt to bring the former relationship within the scope of the law relating to the latter."

With the rejection of the partnership view of marriage, the proposition that the Burmese Buddhist husband and wife are joint tenants in respect of the property of the marriage can no longer be justified. The Dhammathats, while recognising common interests of the spouses in the property of marriage, have nothing in them unequivocally pointing to joint tenancy rather than to tenancy in common. The provisions of Manugye, Book VI, section 43 have been sometimes cited in support of the view that the interest of the spouses are joint and indivisible: and it has been said that the text prohibits the alienation by one of the spouses without the consent of the other. The text, however, hardly supports the contention. It purports to lay down rules applicable equally whether the relationship is that between parents and children or between husband and wife or between teacher and scholar or between master and slave: if the husband and the wife are joint tenants, it follows that parents and children, teacher and scholar and master and slave would also be joint tenants - a result which the most ardent supporter of the joint tenancy view would repudiate. More-over it is not clear whether the restraint on alienation by one of the parties is to operate

only when 'they are not on cordial terms but distinct each other'. On the other hand Manugye at page 240 recognises a definite half share in the hnapazon as that of the husband and the other half as that of the wife. Accordingly the special Bench ruled that the husband and wife in a Burmese Buddhist marriage do not hold property as joint tenants, but as tenants in common, each of them having a vested interest in such joint property.

The special Bench then proceeded to lay down the following propositions: (1) The interest of the judgement debtor in the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone; likewise in such circumstances, the separate property, if any, of the judgment debtor can be attached.

(2) A Burmese Buddhist marriage is not analogous to, still less identical with, an ordinary business partnership. There are no presumptions, de facto or de jure, that a Burmese Buddhist couple, living together, are agents for each other, or that the wife is deemed to consent to the acts of her husband. It is a question of fact to be determined according to the circumstances of each case;

(3) That where it is sought to execute a decree against the joint property of the husband and wife, it is not permissible to execute the decree by attachment of the interest in

the joint property of a party to the marriage unless such party had duly been impleaded in the suit, and was bound by the decree;

(4) That the husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants in common. Each of them has a vested interest in such joint property, and such an interest is liable to attachment and sale in execution of a decree against the person entitled to it, and

(5) That either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in the joint property, but neither of them is entitled to alienate the interest of the other without the consent, express or implied, of that party.

Carr, J., further was of the opinion that both spouses may become liable for the ante-nuptial debts of one only up to the value of the property brought to the marriage by that spouse, if that property has since the marriage been dissipated by the couple, or has become so merged in the joint estate as to become inseperable from it, but that the creditor must sue both spouses to enforce such liability.

Maung Ba, J. while admitting that the interest of a spouse in his or her payin and the lettetpwa is vested, maintained his view that as between themselves, the law that neither party has a right to alienate his or her interest in the lettetpwa without the consent, express or implied, of the

other is still good law.

The decisions of the special Bench in N.A.V.R. Chettyar Firm's case was wholly approved by their Lordships of the Privy Council in U Pe v. U Maung Maung Kha (156); consequently, the principles enunciated therein must now be regarded as settled law.

16. POWER OF ALIENATION.

It has been seen that, in addition to the personal rights and obligations of the spouses arising from the marital relation, there is a community of interests in property between husband and wife. The rights of one spouse over the property of the other and over the joint property are matters of complexity which have led to conflicting judicial decisions, detailed below. But there can now be no doubt that, where both are in agreement, they may do whatever they please with the property of the marriage. Although this appears now to be a self evident proposition, it was at one time contended that, where there is issue of the marriage, the parents can not sell, mortgage or give away their property without reference to the children. In other words, it was sought to establish that the spouses and their children were coparceners, and joint owners of the property of the marriage. For this purpose, reliance was placed on Book VI, section 43 of the Manugye, which beings:-

---

(156) (1932) 10 Ran. 261 (P.C.).

"The teacher has power over the property of the scholar, parents over that of their children, husbands over that of their wives, and the master over that of his slave. The scholar has power over the property of the teacher, children over that of their parents, the wife over that of the husband, and the slave over that of the master."

For the words,'has power over', the Burmese has "paing", which connotes ownership. Hence, at first sight, it would seem that the contention for joint ownership by the children was well founded. The text was discussed at some length by Meres, J.C., who was unable to find any authority for a doctrine that a child at its birth acquires an interest in the property of its parents, as, for instance, the son does, under the Mitakshara school of Hindu Law. The special Court therefore held that the parents during their life time have an absolute disposing power over their property and that they cannot be controlled in this way by their children. (157)

With the abandonment of the principle that the husband is the lord of the wife, the provisions of the Dhammathats cited in section 251 of the Kinwun Mingyi's Digest, Volume II to the effect that the husband has full control over the joint property must now be regarded as obsolete. According to the principle laid down in N.A.V.R. Chettyar Firm v. Maung Than Daing (158), either husband or wife can, during coverture,

---

(157) Ma On v. Ko Shwe, (1885) S.J. 378 at 383.

(158) (1931) 9 Ran. 524 (F.B.).

dispose of his or her own interest in the joint property, but neither of them is entitled to alienate the interest of the other without the consent, express or implied, of that party. This decision was approved by their lordships of the Privy Council in U Pe v. U Maung Maung Kha (159).

A husband or wife may of course sell or mortgage the whole of the property of the marriage with the consent of the other party. Fulton, J.C., said (160);

"The status created by a Burmese marriage does not give the husband a power of selling joint property of himself and his wife except under circumstances in which it can be said that he is acting as her agent. What those circumstances may be is a question of proof in each case. It cannot be disputed that in many instances the husband manages the business of the family with the assent of his wife, express or implied, and where this is the case sales effected by him will bind her." There is no presumption that a Buddhist couple living together are agents of each other in their dealings with third parties; nor can the wife be deemed to have consented to the acts of her husband. Whether one of the spouses has acted as the agent of another in any particular transaction

---

(159) (1932) 10 Ran. 261 (P.C.); N.A.V.R. Chettyar's case and U Pe's case do not effect the decisions prior to Ma Paing's case which allowed either spouse to dispose of the whole or part of the joint property with the other's consent. They merely emphasise that the relationship of Husband and Wife gives rise to no presumption as to partnership or agency. If such partnership or agency is pleaded, it must be proved in the particular case by the party relying on it.

must be established by evidence in each case (161). Thus, where the husband manages the family business, a sale by him of moveable property such as cattle in pursuance of the common business will bind the wife (162). Thus, where a husband, with the consent of his wife, mortgaged a piece of land, part of the property of the marriage, to a chettiar, it was held that in the absence of proof that the wife was aware of the husband's intention to transfer the property outright, a subsequent sale of the property by the husband was invalid (163). In that case, the question whether the sale was valid to the extent of the husband's interest in the land was not raised. In Ma Shwe U's case (164), it was held that the husband could alienate his own share and interest in the property. The decision in U Pe's (165) case was that a gift by the wife of lettetpwa which she inherited during the marriage was valid to the extent of her two-thirds interest. As Heald J., pointed out in Ma Paing's case (166), this is not the same thing as

---

(160) Ma Thu v. Ma Bu, (1891) S.J. 578 at 582.
(161) N.A.V.R. Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524 (F.B.);
Ma Ohn Kyi v. Daw Hnin Nwe, (1952) B.L.R. 222.
(162) Mg. On Sein v. Ma O Net, (1893) II U.B.R. (1892-96) 30303.
(163) Mg. Twe v. Ramen Chetty, (1899) I L.B.R. 11. It may bebe said that the courts always shewed a reluctance to infer agency when the transfer of immoveables by one spouse was involved. On this point, no question of Buddhist Law is involved. Further evidence, however, will be necessary to prove that the wife has consented to the alienation by her husband. The party alleging agency must prove it.
(164) Ma Shwe U v. Ma Kyu, (1905) 3 L.B.R. 66(F.B.).
(165) (1932) 10 Ran. 261 (P.C.).
(166) (1927) 5 Ran. 296 (F.B.)

saying that a husband can alienate the full title in ½ the hnapazon or ⅓ of his wife's payin or inherited lettetpwa, for it ignores the joint debts and the ante-nuptial debts of the wife. But Carr J. in N.A.V.R. Chettyar Firm's case (167) expressed the view that payin means assets less liability prior to the marriage. The important question seems to be whether a spouse, having disposed of his ⅓ of the others inherited lettetpwa can dispose of ⅓ of what is left, in the same way as a spend thrift Hindu coparcener can dispose of his undivided interest in the remainder.

17. SUIT BETWEEN SPOUSES.

As husband and wife are entitled to possess and own property independantly of each other, so there is a right of suit by either in regard to his or her separate property (168). Where a man promises to pay a certain sum of money to a woman as consideration for the marriage and they subsequently marry, the wife may file a suit for the recovery of the sum against the husband during the subsistence of the marriage (169). Where a woman mortgaged her separate property and gave the money thereby raised to her husband to buy some paddy for her, but the husband bought no paddy and refused to return the

---

(167) (1931) 9 Ran. 524 (F.B.).
(168) U May Oung, "Leading Cases on Buddhist Law, 61".
(169) Ma E. v. Maung San Da, (1897) 3 B.L.R. 8;
Chan Toon, Leading Cases on Buddhist Law, Vol. I, 140;
Maung Ba v. Ma Ok, (1902) II U.B.R. marriage 1.

money, it was held that the wife was entitled to sue her husband for the recovery of the sum during the continuance of the marriage tie (170).

18. AGENCY BETWEEN SPOUSES.

Broadly speaking, one of a Burmese Buddhist married couple is not personally liable for an obligation contracted by the other (171). There is no presumption that a married couple living together are agents of each other, and a wife cannot be deemed to have consented to the acts of her husband (172). Whether one has acted as agent of another is a question of fact to be decided in the circumstances obtained in each case.

If one spouse is agent of the other for a particular alienation, the agency extends to everything connected with the alienation. Thus where a Burmese wife consents to her husband mortgaging the joint property as if it were his sole property, she thereby holds him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage. Payment of interest by the husband under such circumstances will save limitation both against husband and wife (173).

---

(170) Ma Mon v. Mg. So, (1904) II U.B.R. (1904-6) Marriage 1; Manugye, Book VI, section 43.
(171) S. C. Lahiri, 'Burmese Buddhist Law', 71.
(172) N.A.V.R. Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524 (F.B.) at 536.
(173) U Rai Gyaw v. Ma Hla Pru, (1904) R.a.M. 180.

A general power of attorney given by the wife to her husband does not empower the latter to sign a promissory note on behalf of his wife. So where a husband signed his own name and that of his wife during her absence on a pronote and there was nothing to show that the husband was acting as his wife's agent, the wife was held not liable for the debt (174).

Where a wife has contracted debts for necessaries, the husband, where he is bound to maintain her, would be liable for the repayment of the debts under the Contract Act. (175)

19. LIABILITY OF THE PROPERTY OF THE MARRIAGE FOR THE DEBT OF ONE SPOUSE.

When a decree has been obtained against one of a married couple, can it be executed against the whole of their joint property? In other words, is the interest of the spouse who was not a party to the suit affected by the decree?

It was siad in Ma Paing's case (176) that during the subsistence of a Burmese Buddhist marriage the separate interests of the parties to the marriage in the property of the marriage are not only impartible but are also indeterminate and indeterminable and therefore the separate interest of a spouse is not liable to attachment in execution of a decree against him or her. But the reasoning upon which this case was based leaves altogether out of account the fact that the parties prior to the marriage possessed an interest in the

---

(174) Mg. San Pe v. Maung Kyan, (1906) II B.L.R. 203.
(175) Contract Act (IX of 1872), section 187.
(176) Ma Paing v. Mg. Shwe Hpaw, (1927) 5 Ran. 296 (F.B.)

property that they severally brought to the marriage.

Even the authors of the Dhammathats assumed that each of the parties to the marriage possessed a definite vested interest in the joint property of the marriage, and that a creditor of the husband was entitled to seize the whole of the joint property of the marriage to liquidate a debt contracted by the husband. It is provided in Manugye (177) that if a debtor "has not the means of paying, let his person be sunk, become a slave, and let his wife, children, or grand children, his heirs, if living with him, also become slaves. If the whole of his property, animate and inanimate, be taken possession of, and do not cover the amount of the debt, the creditors shall have no further claim; let that be a final settlement."

Those drastic and archaic methods of enforcing payment of debts are obsolete, but the rules for enforcing the payment of debts laid down in the Dhammathats do not contemplate or support the notion that neither husband nor wife in a Burmese Buddhist marriage possesses a definite interest in the joint property of the marriage, or an interest that is capable of being attached and sold in liquidation of a debt contracted by one of the parties to the marriage.

Then came the case of N.A.V.R. Chettyar Firm v. Mg. Than Daing (178). The facts are simple. There was an ante-nuptial

---

(177) Manugye, Book III, section 2.
(178) (1931) 9 Ran. 524 (F.B.).

debt of the wife for which debt the husband was not liable. The property sought to be taken in execution was lettetpwa of the marriage. This case was not governed by the actual decision in Ma Paing's case (179), but it was obviously affected by what had been said in the general review of the law given in the reference in that case. The judgment was very exhaustive and commenting upon Ma Paing's case (180) Page, C.J., pointed out that no one could safely deal commercially with a married Burmese Buddhist unless he was sure that the wife would be held bound by the transaction; moreover, all ante-nuptial liabilities could be evaded by marriage. The court therefore held that a Burmese Buddhist husband and wife do not hold the property as joint tenants but as tenants in common. The law now in force was as laid down in this case and approved in U Pe v. U Maung Maung Kha (181). It may now be regarded as settled that the interest of either spouse, in the property of the marriage may be attached and sold in execution of a decree against that spouse, whether the decree is in respect of an ante-nuptial debt or in respect of a debt contracted after the marriage (182), provided that the spouse against whose interest the decree is sought to be executed has been duly impleaded to the suit and is bound by the decree (183).

---

(179) (1927) 5 Ran. 296 (F.B.).
(180) (1927) 5 Ran. 296 (F.B.).
(181) (1932) 10 Ran. 261 (P.C.).
(182) Ma Thaing v. Mg. Tha Gywe, (1901) II U.B.R.Exec. of decree 1.
N.A.V.R.Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524 (F.B.)

Thus, where a wife is not a party to a suit against her husband and a decree is passed against her husband alone, the husband's interest in the joint property is liable to attachment and sale. If it is sought to make both the husband and the wife and the whole of the joint property of both liable for a debt, both the husband and the wife should be impleaded in the suit (184). Where the joint property of husband and wife is attached for a decree passed against the wife alone, the decree holder may be ordered to pay damages to the husband for the wrongful attachment of his share. (185) If immoveable property stands in the joint names of both husband and wife and if she is not impleaded in a mortgage suit, her interest in the property cannot be sold in execution of a decree passed against the husband alone (186).

The interest of either spouse in the property of the marriage is property capable of being sold within the meaning of section 60 of the Code of Civil Procedure (187).

The only exception to the rule given above is where one spouse is the benamidar (that is a person who has been clothed with the indicia of ownership by the real owner) of the other, in which case the decree against the benamidar binds also the other spouse who is the beneficial owner. (188)

---

(183) Ma Nyun v. E.E.Teixeira, (1910) 10 L.B.R. 36 (F.B.); Ma Hme v. Ma Pon, (1932) II Ran. 112.
(184) Ma Me v. Maung Gyi, (1892-96) II U.B.R. 45.
(185) Ma Thaing v. Maung Tha Gywe, (1902-03) II U.B.R (1902-3) execution 1.
(186) Ma Sein v. Muthukurpan, (1913) 7 L.B.R. 135.
(187) Ma Nyun v. E.E.Teixeira, (1910) 10 L.B.R. 36 (F.B.); N.A.V.R. Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524 (F.B.).
(188) Ma Nyun v. E.E.Teixeira, (1910) 10 L.B.R. 36 (F.B.).

It has been held that the mere fact that the wife acquiesces in a mortgage of the property of the marriage by the husband is not sufficient to constitute him a benamidar, and consequently a decree holder who has failed to implead the wife can execute his decree only against the husband's interest (189). The position has, however, been held to be otherwise where all the properties in respect of which the wife claimed stood in the sole name of the husband (190).

If at the time of his marriage a Burman Buddhist has debts the amount of which exceeds two-thirds of the value of the property brought by him to the marriage, does his wife obtain a vested interest in a one-third share of that property free from liability in respect of any portion of her husband's indebtedness? (191). The point appears not to have been decided, but Carr, J., in Maung Than Daing's case (192), expresses the view that the husband's payin meant the assets less the liabilities of the net estate. It followed, therefore, in his view, that the general rule with regard to attachment must be qualified by holding:

(1) that property actually brought to the marriage by one spouse who has also ante-nuptial debts remains liable to attachment and sale under a decree against that spouse for such debts, and

---

(189) Ma Nyun v. E.E. Teixeira, (1919) 10 L.B.R. 36 (F.B.)
(190) Ma E Mya v. The Japan Cotton Co., (1926) 5 B.L.J. 218
(191) O.H.Mootham, 'Burmese Buddhist Law', 33.
(192) (1931) 9 Ran. 524 at 555 (F.B.).

(2) that both spouses may become liable for the ante-nuptial debts of one only, up to the value of the property brought to the marriage by that spouse, if that property has since the marriage been dissipated by the couple otherwise than in satisfaction of such ante-nuptial debts, or has become so merged in the joint estate as to become inseparable from it. The case is exactly analogous to the case of the heirs of a deceased person who takes his properties subject to his debts, and who, if they dispose of any of the property, incur a personal liability for the debt up to the value of that property.

The position that is created when a party takes to the marriage both assets and previously contracted debts ~~is~~ depends ~~relied~~ on the general principles of equity, justice and good conscience and not on anything in the Burmese Buddhist Law.

20. COMMUNITY OF PROPERTY

(i) The Present Position.

The present position regarding the property of a married couple, which has been described as a 'mosaic of separate rights' differs profoundly from that envisaged in the Dhammathats, where the distinguishing feature of marriage is that it creates a community of property between the spouses (193), irrespective of origin or form, so long as the marriage subsists, a common indivisible whole of which the spouses are co-proprietors. The management of the property is entrusted to the husband, who, for this purpose, exercises wide powers.

(193) Digest II, section 251; Manugye, VIII, 3.

The texts allow him freely to alienate all kinds of property and do not deny him the right to dispose of the wife's pre-nuptial property unless the transfer is without consideration, while the wife may not alienate it in any way without the consent of her husband (194). It is otherwise if the two spouses had been previously married. In that case, there is some textual authority for the view that each spouse may dispose of his or her pre-nuptial property. The wife retains the right to enjoy the property which she had brought to the marriage, and the husband cannot dispose of it without her authority except in exceptional circumstances (195). The common property is liable to discharge the debts contracted by the two spouses, or by one of them, if the debt is contracted with the knowledge of the other, or in furtherance of their common interests. When the spouses separate, each takes back the property he or she brought to the marriage. The rules set out for determining the share of each spouse in the different kinds of property of the marriage were not intended to take effect until the marriage was dissolved, when the question of partition of the property between the spouse arose. The texts only prescribe that rules for the purpose of partition. As long as the marriage existed, the whole of the

---

(194) Digest II, section 252.
U May Oung, "Leading Cases on Buddhist Law", 67.

(195) R. Lingat, "Les Regimes Matrimoniaux", Chap. II, 20.

property of the marriage formed an indivisible whole, liable in globo for their obligations (196).

Being unfamiliar with the concept of community of property, the Anglo-Burmese Courts found it difficult to find satisfactory answers to the questions in whom is management vested, to what extent may a spouse deal with the property of the marriage, to what extent is the property of the marriage liable to be taken in execution of a decree against one spouse, and what restrictions on the power of separate alienation are necessary to prevent the spendthrift spouse prejudicing the rights of the other. Admittedly the Dhammathats gave little assistance; legislation is therefore necessary in Burma (197).

The courts do not construe literally and without exception the texts vesting the management of the property of the marriage in the husband. Where a married couple are engaged in trade, they usually operate in their joint names, and in all transactions of importance such as alienations of land, and borrowing money on a promissory note, the other party to the transaction will usually insist, where necessary, on both spouses executing the necessary documents. It is when one spouse has incurred the liability and the other spouse has

---

(196) R. Lingat, Les Regimes Matrimoniaux, Chap. II, 20.
(197) Prof. A. Gledhill, "Burmese Law in the 19th Century with special reference to the position of women", 32.

repudiated the transaction that difficulties arose. In the old Burmese courts, the main object of the procedure in execution seems to have been to compel the debtor to pay, or to induce someone to help him to do so. In particular, it was almost impossible to sell land out right, but the procedural law in the Anglo-Burmese Courts, with negligible exceptions, empowered a creditor to levy execution by the attachment and sale of anything over which the debtor had a disposing power, and the Court actively assisted him in the process (198). In some cases on claims arising out of the action of one spouse, the Courts held that the spouses were in the position of partners, and so agents for each other (199), but they would not apply this to an alienation of immoveables (200), nor to an alienation by the husband of the wife's prenuptial property (201). In some cases they held the interest of a spouse liable to be taken in execution of his or her separate debt (202). The principle of partnership was at one time given unlimited application (203), but this

---

(198) Prof. A. Gledhill, "Burmese Law in the 19th Century with special reference to the position of women," 33.
(199) R.M.M.S. Soobramonian Chetty v. Ma Hnin Ye, (1899) P.J.L.B. 568.
(200) Mg. Twe v. Ramen Chetty, (1899) I L.B.R. 11.
(201) Ma Pyu U v. Mg. Po Kyun, (1907) 11 L.B.R. 49.
(202) Ma Me v. Maung Gyi, (1892-96) 2 U.B.R. 45.
(203) Ma Paing v. Mg. Shwe Hpaw, (1929) 7 Ran. 398 (F.B.).

doctrine was rejected in favour of the principle that each spouse had an attachable and alienable interest in the property of the marriage, equal to that which he or she should receive on a divorce by mutual consent (204). Either spouse may now during the marriage, alienate his share in the payin or lettetpwa without the consent of the other. Each item of the property is their common property and remains undivided only so long as the spouses wish it. The community of property which marriage involves has thus become very precarious, and the tendency is to substitute for it a mosaic of separate rights.

These are the rules governing the rights of the spouses in the property of the marriage at Burmese Buddhist Law. The Burmese Buddhist Law has nothing comparable to the provisions which, in French Law, Roman Dutch Law, and the new law of Thesawalamai (The Ceylon Matrimonial Rights and Inheritance Ordinance, 1911) (205) are designed to safeguard the rights of the wife. The existing rules designed to protect the wife were originally unknown in the law of community of property as understood in France, Holland and Ceylon, but they were gradually incorporated in the course of time as the powers of the husband over common property were developed and extended.

---

(204) N.A.V.R. Chettyar Firm v. Mg. Than Daing, (1931) 9 Ran. 524. (F. B.).

(205) J. Brissand, "History of French Private Law," 822; H. W. Tambiah, "The Laws and Customs of the Tamils of Jaffna", 121.

The Anglo-Burmese Lawyers to whom the conception of community was unfamiliar, naturally tended to destroy it rather than improve it, while the French Law, Roman Dtuch Law, Thesawalamai Law developed in the direction of recognising an increasing participation of the woman in the management of the property of the marriage, and complete equality between the two spouses (206). It is therefore submitted that, if it is desired to retain the conception of community, while providing solutions to the problems which it creates, no more can be done by development in the courts in the directions in which it has progressed during the British period. The only solution is by legislative enactments making possible a first approach to the whole subject. It is idle to suggest that a remedy may be found in marriage settlements, because a marriage contract, if not entirely unknown, is rarely met with, and is regarded with disfavour by the courts, because they would introduce startling innovations in the Buddhist Law of marriage, which would be contrary to the usages of the people (207).

(ii) Legislative Enactment Suggested.

In French Law, when the institution of Commaunaete Legale governs the rights of the spouses, the management of the

---

(206) H. W. Tambiah, "The Laws and Customs of the Tamils of Jaffna", 101;
J.Brissand, "History of French Private Law".

(207) O. H. Mootham, "Burmese Buddhist Law", 25.

property of the marriage is with the husband, but he may not deal with it so as to defraud the wife, nor so as to enrich himself at the expense of the community, nor so as to impoverish it without benefit (e.g. by indulging in exorbitant largesse). He may not make gifts of immoveables, or of the whole or a share of an estate comprising moveables subject to debts, except to a child of the marriage. The wife's separate property is also administered by the husband. In French Law, as in Burmese Law, the distinguishing feature of marriage is that it creates a community of property between spouses (208). The community in French Law is created on marriage and it is somewhat like a private partnership. The community in French Law is not regarded as a legal entity except for purposes of taking an account. The position is the same in Roman Dutch Law, the new law of Thesewalamai in Ceylon, (209) and it is suggested that it should be the same in Burma.

The important question in Burmese Buddhist seems to be whether a spouse, having disposed of his one-third of the others inherited lettetpwa, or of his half hnapazon or ordinary lettetpwa, can dispose of one-third or half of what is left, in the same way as a spendthrift Hindu coparcener can dispose of his undivided interest in the ancestral estate and then of his undivided interest in the remainder. In Hindu Law, the other coparceners can protect themselves against an improvident coparcener by partition. But this right is not

(208) H. Cachard, The French Civil Code, sec. 1399.
(209) H.W.Tambiah, The Laws & Customs of the Tamils of Jaffna, 101.

available to a Burmese spouse when the other is extravagant or imprudent. It is suggested, therefore, that a Burmese spouse should be given the right of suing and getting judgment dissolving the community, when he or she apprehends the misconduct or misfortunes of the other spouses.

Action for Compensation.

If one spouse has sold or mortgaged more than his or her share of the property of the marriage during the subsistence of the marriage, the other spouse or his or her heirs should be given the right to bring an action for compensation when the community of the property ceases to subsist on the determination of the marriage by death, divorce or dissolution by the Court.

If one of the spouses has donated more than his or her share during the subsistence of the marriage and the donee has alienated the property for valuable consideration to a bonafide purchaser, then the only remedy that would be open to the other spouse would be to claim compensation. The same observation would apply if the donee mortgaged the property to a bonafide mortgagee and the property was sold under the mortgage sale. But the action for compensation may be prescribed in three years from the time the cause of action arose (210).

---

(210) See H.W. Tambiah, The Laws and Customs of the Tamils of Jaffna, 206.

CHAPTER X

Dissolution of Marriage

1. The nature of marriage in Burmese Buddhist Law.

The indissolubility of the marriage tie has until the enactment of the Hindu Marriage Act 1955, been the distinguishing feature of Hindu law except where divorce and re-marriage was permitted by customs among the Sudras (1) and in certain States in India where it was permitted by recent legislation (2). The conception of Marriage in Hindu law is entirely different from that in Burmese law. Hindu marriage is a sacrament and, having been performed with the accompaniment of religious rites and ceremonies, it is intended to be an indissoluble life-long union. But the Hindu marriage Act 1955 has given all Hindus, whether married before or after the commencement of the Act the right, in specified circumstances, to obtain a degree of nullity, or of dissolution of marriage. This is a revolutionary change in the Hindu law but Hindu marriage does not, like Muslim marriage, become contractual. It is still an act-in-law performed by the observance of certain rites and ceremonies creating a new status which cannot be changed by agreement of the parties. Such an act may be void or voidable, and the resulting status may be dissolved

---

(1) Jiva Magan v. Bai Jetthi, (1941) I.L.R. Bom. 538; Thangamonat v. Gangay Ammal, (1946) I.H.L.J. 279.

(2) The Bombay Hindu Divorce Act 1947; The Madras Hindu (Bigamy Prevention and Divorce) Act, 1949.

by a degree of a court in the same way as a Christian marriage, but a Hindu marriage is a sacrament even under this Act and the sacramental character of the marriage has not been lost. The Brahmanical ceremony of saptapadi (the taking of seven steps by the bridegroom and bride jointly before the sacred fire) is specially mentioned in the Act (3) but a Hindu marriage may be solemnised by performence of the customary rites and ceremonies of either party (4). It was necessary to reform Hindu law because cases prior to the Act went so far as to hold that neither change of religion, nor loss of caste, nor adultery of either party, nor even the fact that the wife had deserted her husband and became a prostitute could give the right to get a Hindu marriage dissolved (5). Such a law of marriage was intolerable in the social conditions prevailing in India to-day. To retain it would not have conduced to upholding the sacredness of the marriage ties among Hindus but would have perpetuated unhappiness and suffering and encouraged anti-social elements to cut into the very vitals of Hindu society. The distinguishing feature of the law of divorce as prescribed by section 13 of the Hindu Marriage Act is the

---

(3) Hindu Marriage Act (25 of 1955) see 7(2).
(4) Ibid. see 7(1).
(5) Govt. of Bombay v. Ganga, (1880) 4 Bom. 330;
A.G. of Madras v. Anandachari, (1886), 9 Mad. 766;
In the matter of Ram Kumari, (1891) 18 Cal. 264;
Subbaraya v. Ramasami, (1900) 23 Mad. 171;
Narain v. Tirlok, (1907) 29 All. 4;
Pakkian v. Chettiah Pillai, (1923) 46 Mad. 839 (F.B.);
Gopal Krishna v. Mst. Jaggs, (1936) 631 A. 295;
Banarsi Das v. Sumat Prasad, (1936) A.I.R. All. 641;
Gul Muhammad v. King Emperor, (1947) 1 I.R. Nag. 205.

unique equality of sexes, as in Burmese law. Except where difference of sex necessitates different rules, both husband and wife have equal rights.

Marriage according to the notions of Burmese Buddhists, is a partnership of love, affection and sympathy which should come to an end when these perish. The most striking feature is the community of property created by the union. When the parties wed, the spouse, virtually if not literally, say to each other "with all my worldly goods I thee endow," and the joint ownership is jealously guarded both by written law and by popular sentiment. Consequently, when husband and wife part, there must be a separation, not only of heart and hand, but of goods as well, and unless there is such a separation there can be no divorce (6).

2. Modes of Dissolution of Marriage.

It is said that marriage is as easily dissolved as it is contracted. "The fundamental principle of the Buddhist Law of marriage (says Burgess, J.C.) seems to be freedom of forming connubial union and equal freedom of dissolving it." (7)

Jardine (8) also is of the same opinion: "The marriage may easily be dissolved by the Burmese custom and contracted again with great facility."

But it cannot be disputed that the general propositions stated above are subject to a good deal of qualification.

---

(6) Ma Gyan v. Mg. Su Wa, (1897) 2 U.B.R. (1897-01) 28.
(7) Ma Gyan v. Mg. Su Wa, (1897) 2 U.B.R. (1897-01) 28.
(8) Notes on Buddhist Law, part 1, para. 29.

Texts cited in the Dhammathats go to show that the Buddhist Law forbids hasty abandonments for frivolous reasons, and discourages them by forfeiture and other penalties. For example, mere angry words and hasty separation which not infrequently follow a quarrel on slight occasion cannot be treated as equivalent to a divorce, nor can a seducer take advantage of that state of temper so as to free the wife from the matrimonial tie. Time is given to the parties to cool their tempers and correct their faults (9). "The delay interposed, the time given for passion to cool, prevent coercion, undue influence, fraud, misrepresentation, and mistake. A man cannot avail himself of the angry recriminations of a quarrel so as to cast away all of a sudden such duties as law, religion, and the welfare of society impose in regard to wife, children and creditors. A Court of Equity interferes to prevent cunning advantages being taken of anger or surprise: in nearly all statutes about divorce, provision is made for the tempers of parties to cool" (10). In a word, a divorce, to be valid, must not be a hole-and-corner proceeding. (11)

The mere separation or absence of one party from the other does not necessarily imply a divorce. There is a distinction between separation and divorce. But there are no adequate words in Burmese language to denote the exact difference

---

(9) U Tha Gywe, A Treatise on Buddhist Law, Vol. I, 96.
(10) Nga Lon v. Ma Myaing, (1883) S.J. 206 at 211.
(11) M.T. Gywe, A Treatise of Buddhist Law, Vol. I, 97.

between separation and divorce. The word 'kwa' is indiscriminately used to express both ideas (12).

An abandonment without cause is punishable with stripes in the case of the husband and with the shaving of the head in that of the wife, in addition to forfeiture in both cases(13). Different kinds of mis-conduct and various justifying divroces, exparte or otherwise, are treated in this chapter.

A marriage between Burman Buddhists

(a) may be determined at any time by consent of the parties,

(b) is determined by the desertion of the wife by the husband or of the husband by the wife for a prescribed period,

(c) is determined by the husband entering the Buddhist priesthood (14),

(d) is determined by a Court of competent jurisdiction on proof of the commission by one party of a matrimonial offence (15).

A Civil Court of competent jurisdiction (16) may pass a decree dissolving a Buddhist marriage for one of the following matrimonial offences at the instance of an innocent spouse:

(1) adultery by the wife;

(2) taking of a second wife (in certain circumstances) by

---

(12) Ma Hmon v. Mg. Tin Kauk, (1923) 1 Ran. 722 at 734.
(13) M.T.Gywe, A Treatise of Buddhist Law, vol. I, 97.
(14) U May Oung, Heading Cases on Buddhist Law, 116.
(15) Daw Khin Pu v. Dr. Thaŧ Mya, (1949) B.L.R. 283 at 315.
(16) O. H. Motham, Burmese Buddhist Law, 36.

the husband without the consent of the first wife;

(3) cruelty by either spouse.

There are other grounds for divorce set out in the Dhammathats, which have not been recognised in the courts, being either obsolete, or repugnant to the present judicial notions of justice, equity and good conscience.

3. Dissolution without the intervention of a Court.

(a) Divorce by mutual consent.

This is by far the commonest mode of divorce followed in Burma. When the husband and wife no longer desire to continue marriage tie, they can dissolve the marriage by mutual consent without going to Court. No witnesses are necessary and a deed of divorce need not be drawn up (17). Where a divorce deed is drawn up, it must be stamped as required by Article 29 of Schedule I of the Stamp Act (II of 1899). The vast majority of such divorces are the result of momentary quarrels and a large per centage of them are followed by a re-union in the end. For such a divorce there must be some formal and mutual agreement or expression of consent (18). Mere sending a letter to the wife intimating an intention to divorce her when she was out of her mind would not sufficie to dissolve the marriage tie (19). Where an angry wife sends to her husband a hasty

---

(17) Ma Hnin Ngon v. Nga Aung, (1876) S.J. 73.
(18) U Chan Toon, Burmese Buddhist Law, 52; U May Oung, Leading Cases on Buddhist Law, 69.
(19) Mi Chin Mari v. Mi Tu Ma, (1877) S.J. 74.

rejoinder containing expressions which do not constitute or which do not mention a proposal or even an agreement that divorce should be effected between them or which do not in themselves operate to effect a divorce, this cannot be taken advantage of by the husband to entitle him to consider the marriage dissolved (20). The intention of both parties must be to dissolve the union for good, because, besides bonafide mutual consent divorce, there is another kind of divorce known as jobye-nanbye divorce or sham mutual consent divorce.

In an early case, decided in 1893, it was held by the Recorder of Rangoon that a custom existed whereby one party to a marriage might, in case of serious illness, give to the other a temporary divorce (21). In order to get rid of illness or other ill luck a temporary sham divorce, as recommended by a consulting astrologer until such time as the planets are faovourably placed, is also effected for a specified time. When the stated time is over or if the sick party recovers, the couple resume cohabitation without a formal marriage. It is not a divorce in the legal meaning of the term (22).

There is a remarkable difference between a mutual consent divorce in Burmese Buddhist Law and that now provided in India by s. 28 of the Special Marriage Act 1954. Both spouses must

---

(20) Maung Tin Saw v. Ma Shein Mya, (1904) 10 B.L.R. 225.
(21) Mg. Ba Oh v. Mg. San Bu, (1893) I.L.C. 137.
(22) Ma Hmon v. Ma Tin Kauk, (1923) 1 Ran. 722 at 735.

file a petition alleging that they have lived separately for at least a year, that they cannot live together, and mutually agree to the dissolution of the marriage. Not less than one year, and not more than two years, the Court may hear the petition and if satisfied of the truth of the allegations, and the absence of any legal objection, grant a decree for dissolution.

(b) Kan-masat Divorce

Of the thirty six Dhammathats digested by the Kinwun Mingyi, only Manugye speaks about a divorce on the ground of "kan-masat" and the English translation of the passage that refers to it (23) read thus:

"When the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, when there is no fault on either side but their destinies are not cast together the law for the partition of property is this ....."

There was at one time a great controversy over the interpretation of the term "kan-masat" and it may be reasonably said that it is yet unsettled although it was last discussed in the year 1930 by Page, C.J. in Maung Kywe v. Ma Kyin (24). The learned Chief Justice remarked that even if such a divorce were permissible in days gone by, it is not countenanced by modern Buddhist society.

---

(23) Manugye, Book XII, sec. 3.
(24) (1930) 8 Ran. 411 at 414.

According to Dr. Forchhammer, the word "kan-masat", when applied to the question of divorce, "Cannot mean anything else than a desire of separation or divorce dictated by the fear of the faultless party to become co-parcener to the course of retribution which with unerring certainty - the Buddhists have no Redeemer - will follow the evil deed committed by the faulty individual under their matrimonial contract; and what the sins are that admit of divorce is plain from the Dhammathats. The words under comment ကံ ဖောက် fully interpreted mean that a party to a matrimonial or other contract sees that through the commission of an atrocious act by the other party and by continuing to be partner to the contract, he is in danger of becoming involved in demeritorious deeds, which will reduce him to pain and misery for almost countless existences ..... But his desire to separate on account of ကံ ဖောက် is dictated by the necessity to adjust his own kamma which no other human or divine agency has the power to influence in the least. The nature of the act committed in the case of ကံ ဖောက် must, inasmuch as it affects society or existing law, be dealt with separately; the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, parricide, killing, stealing, shedding the blood of the Buddha or a rahan, heresy and adultery." (25)

U May Oung, in his Leading Cases (26) criticised the views of Dr. Forchhammer, pointing out that the words အပြစ် မရှိ "a fault does not exist" appearing in Manugye are inconsistent

(25) Jardine's Note IV, Introductory Preface, 9.
(26) U May Oung, Leading Cases on Buddhist Law, 95.

with the notion of a fault or crome which the latter sought to read into the words "kan-masat" and that the assumption that one person may suffer retribution for the sin of another is contrary to the teachings of the Buddha. He also questioned the authority for Dr. Forchhammer's list of deeds which will justify a Buddhist in severing his destiny from that of his or her partner. He next proceeded to recount five great sins - pancanantariya - namely, matricide, patricide, killing an arahat, shedding the blood of a Buddha, and causing dissension among the Sangha or priesthood, and observed that none of the said sins and evil deeds mentioned by Dr. Forchhammer is mentioned in the Dhammathats as a ground for divorce. He then gave his own interpretation of the term "kan-masat" as meaning that "the fortunes of the married pair are not linked together, i.e. the bad fortune of one is acting as a drag on the possible good fortune of the other." He continued, "Where a person finds after a period of married life that he is unable to make his way in the world or is continually suffering from misfortunes or illness or is, for some unascertainable reason, uniformally unhappy, then, although no tangible fault can be ascribed to the other party, he feels that their "destinies are not cast together" and therefore desires to separate. This sometimes happens in Burma, where a great many marriages are "arranged" by the parents regardless of the wishes of the prospective bride and bridegroom, or at best, with the approval of only one of them. Post-nuptial love cannot always be counted upon,

and one or the other may after a time seek a dissolution. Where the other party can be persuaded to consent to a divorce, all goes well; otherwise unhappiness must ensue if the discontented party be not permitted to plead "kan-masat" and forfeit all the joint property in so doing."

The meaning of the word "kan-masat" is obscure, and there can be little doubt that the words "no fault on either side" appearing in the Manugye text cited above refer to matrimonial faults only; consequently "kan-masat" divorce can only be sanctioned on account of defects other than matrimonial faults, which will justify either spouse reasonably to contend that fortune had not blessed the marriage. Mr Justice Fulton in the case of Nga Nwe (27) explained that Section 3, Book XII of the Manugye shows that only when destinies of husband and wife are no longer linked together (kan-masat) can a divorce be granted.

It could be argued that according to Burmese notions husbands and wife are so peculiarly bound to each other that, so long as the marriage subsists between them, the sufferings of the one and the evil consequences that may ensue to one from his or her evil deeds during his or her lifetime are bound to affect adversely the life of the other even in the present existence. Hence, where the husband for instance, commits any one of the five great sins (i.e. Pancanantariya kamma) he is,

---

(27) Nga Nwe v. Mi Su Ma,(1886) S.J. 391.

according to the teachings of the Buddha, bound to suffer from its evil consequences during his life time, and if the marriage is not dissolved, his wife will surely become involved therein, not by way of punishment for the sin of her husband, but merely because she happens to be a life-partner of the latter. The innocent spouse may claim a divorce on the ground of "kan-masat" i.e. their fortunes are no more linked together. This explanation, if accepted, would bring the long disputed text from the Manugye within the bounds of reasonable understanding. But, if this had been what the Buddhist Law givers contemplated, it seems probable that it would have found a place in other passages of Manugye and other Dhammathats. It would have been much too important to be omitted.

However, it remains to be seen whether, apart from the solitary text in the Manugye which mentions the expression Kan-masat, there are other authorities which allow a person a right of divorce against the will of the other party, the latter being without fault. These were cited and commented upon at great length in Sir George Shaw's judgment(28A).

Heald, J., in discussing the authorities on this question in the case of Ma Hmon v. Maung Tin Kauk said (28),

"A Burman reading the words (kan-masat) would not, I imagine, read into them more than "in compatibility of destiny"

(28A) Mi Kin Lat v. Nga Ba So, (1904) II U.B.R. (1904), Buddhist Law, Divorce 3.
(28) (1923) I Ran. 722

which after all is not a very different idea from that of "incompatibility of temper" in its old sense of "temperament", but whether they mean "incompatibility of sexual desires", it seems to me probable that the words which as I have said appear in no other Dhammathats were added by the writer of Manugye because, at the time when that Dhammathat was compiled, divorce without reason was repugnant to the ideas and customs of the people and he therefore felt constrained to give some kind of reason for it. The explanation of the ommission of the words in Attasankhepa is clear, since there the Kinwun Mingyi was merely rendering into prose a metrical text in which no similar word appeared. There is a further point which seems to me to support my view that the passage allowing divorce without fault belongs to an archaic law, namely, that it is omitted in several of the Dhammathats which deal directly with the subject of divorce. It does not appear in the Manuyin, which is said to be based on Wagaru and is slightly earlier in date than Manugye, and the rules given in Manuyin and which contains rules similar to those in Manugye as to the wives who should not be divorced are, like those in Manugye, inconsistent with a right of divroce without fault; it does not appear in Vannana which is supposed to be a little later in date than Manugye as to wives who may or who may not be divorced; and although the Mohavicchedani, which is said to be the latest of the

Dhammathats strictly so called, gives the old law, saying, "If a man wishes to be divorced let him leave behind all animate and inanimate property; if the woman wishes to be divorced let her head be shaved and let the husband have the right to sell her as a slave; it goes on, like Manugye and other Dhammathats which mentions the old law, to give lists of faults for which a wife is to be admonished but not divorced." The learned Judge sums up as follows:- "It seems clear therefore that although a right to divorce were recognised in the ancient law which was adopted into the Buddhist law books, nevertheless that right was modified by commandments in those very law books forbidding divorce except for serious fault."

However, it may be said that the passage wherein the words appear states the rule which has for at least two centuries been a dead letter, the matter becomes one of academic interest; and nothing further be said than that in spite of labours of learned scholars and Judges, the interpretation of the passage and the words "kan-ma-sat" remain a matter of doubt and obscurity.

(c) Divorce on mere caprice.

The first point that arises is whether one party to a marriage may divorce the other in the absence of any 'fault' on the part of the latter, whether the courts will recognise the right for which there is authority in the Dhammathats to what has been called an 'exparte' divorce or 'divorce at mere caprice'.

Prior to a decision of the High Court of Judicature, in the case of Maung Kywe v. Ma Kyin (29), the decisions in Lower and Upper Burma were in conflict and there was the greatest uncertainty prevailing on this point. It has now, however, been authoritatively laid down in the above mentioned case that, under Burmese Buddhist law, as administered in the Courts, neither party has the right to insist on a divorce against the will of the other party without proof of misconduct or matrimonial fault on the part of the other party.

The Special Court of Lower Burma held that one party to a marriage can not divorce the other in the absence of any fault on the part of the other. Before a divorce can be ordered against the wish of the defendant, the plaintiff must prove either that the defendant has committed some fault against the plaintiff and the fault is of a sufficiently serious nature to justify a divorce according to the Dhammathats or that the defendant has committed some evil deed for which a separation of destinies can take place. Mere willingness on the part of the plaintiff to pay compensation (kobo) or to surrender the whole of the joint properties cannot be treated as one of the grounds sanctioned by the Dhammathats for a divorce (30). But the Judicial Commissioner's Court of Upper Burma held that though a divorce cannot be granted merely on the ground of kan-ma-sat i.e. an allegation that the destinies of the husband and wife are not cast together (31), a husband or wife may sue and obtain a divorce on condition of

(29) (1930) 8 Ran. 411.

(30) Mi Pa Du v. Maung Shwe Bauk (1891) S.J. 607;

(29) (1930) 8 Ran. 411.

(30) Mi Pa Du v. Maung Shwe Bauk, (1891) S.J. 607; (1892-96) 5. Mga Nwe v. Mi Su Ma, (1886) S.J. 391.

surrendering all joint properties and paying the debts as also the costs of the litigation when the other party is without fault and does not agree to a divorce (32). The the Chief Court of Lower Burma set the controversy at rest for the time being when it held that one of a Burman Buddhist couple is entitled to a divroce on payment of the costs of the suit and foregoing all claim to the joint properties of the marriage, even though the other party does not consent to it and no legal cruelty is proved. It is necessary at this point to emphasise that the passage from the Manugye (33) dealing with 'kan-ma-sat' divorce was responsible for the decisions that the husband or wife may sue and obtain a divorce on condition of surrendering all the joint property and paying the joint debts and the costs of the litigation. The Judges construe the word 'fault' as a 'matrimonial' fault. A year later, a Division Bench of the Rangoon High Court definitely held in Ma Hmon v. Maung Tin Kauk (34) that where the couple are eindaunggyis, neither party has the right to insist on a divorce against the will of the other party, and without proof of misconduct or default of the other party. Heald, J., observed interalia; "In my opinion, the right to divorce without fault, like a large number of other rights mentioned in the Dhammathats, has long been obsolete. It is not supported by custom; its

---

(32) Mi Kin Lat v. Nga Ba So, (1904) II U.B.R. (1904-6) Div. 3.
(33) Manugye, Book, XII, sec. 3.
(34) (1923) 1 Ran. 722.

resurrection in the British courts for a few years, fifty or sixty years ago, was the result of a mere accident; if allowed if would defeat the provisions of the law as to the maintenance of wives, and would practically destroy marriage as a permanent institution. It is a mere relic of the ages of barbarism. For the past forty years, it has been rejected in Lower Burma without objection of the part of the people, and the fact that its recognition in Upper Burma nearly twenty years ago has not been followed by a demand for such divorce shows that it is contrary to the present ideas of the people."

Subsequently the matter was reconsidered in Ma E. Shaw v. Maung Myat Paw (35) where the wife sued to divorce the husband on mere caprice and the trial court granted her a decree which was confirmed by the first Appellate Court without taking into consideration the effect of the decision arrived in Ma Hmon's case. In second appeal the High Court set aside the decree and dismissed the wife's suit relying on Ma Hmon's case. The wife then filed a Letters Patent appeal and the same was heard by Pratt and Rutledge, JJ. who differed from Heald, J.'s opinion in Ma Hmon's case. The case was then referred to a Full Bench for decision. But before the Full Bench could decide the point whether one of a married couple is entitled to sue the other and obtain a divorce on surrendering all joint

---

(35) Civil Reference No. 5 of 1925 of the Rangoon High Court; see S.C. Lahiri, Burmese Buddhist Law, 79.

properties and paying all joint debts as also costs of the litigation without establishing any fault on the other spouse, the wife died and the appeal abated. Thus the point was left undecided.

Subsequently, in Maung Kywe v. Ma Kyin (36) Page, C.J., discussed all previous authorities touching the point and said interalia: "Whatever may have been the legal position in ages long past, I am satisfied that under the personal law of the Burman Buddhists as it obtains today, divorce at the instance of one party to the marriage merely for caparice and without proof of some matrimonial fault is not permissible, even if the party desiring the divorce is prepared to surrender his or her share of the joint property, and to pay 'kobo' ('price of the body')." His Lordship, therefore, concluded that a divorce is not permissible at the will and pleasure of one party to a Buddhist marriage without proof of a matrimonial offence. It is respectfully submitted that this decision is correct and in accordance with the customs prevailing at the present day.

4. Automatic Dissolution of Marriage.

(a) Dissolution of marriage on the grounds of Desertion.

According to the Dhammathats(37), a Burmese Buddhist marriage becomes automatically dissolved for one of the following reasons:

(1) desertion by the husband for three years and by the wife

---

(36) (1930) 8 Ran. 411.
(37) Digest II, Sec. 312;
Digest II, Sec. 411.

for one year, accompanied by the failure of the husband to maintain the wife during the specified periods of desertion; and

(2) ordination of the husband without retaining an animus revertendi to his lay status.

The law on the subject of desertion as a ground for dissolution of marriage is set out in the extracts from the Dhammathats reproduced in section 312 of the Kinwum Mingyi's Digest, Volume II. As the text of Manugye is clearer and more precise than the extracts from the other Dhammathats, it is invariably cited and relied on by the Courts and it is, therefore, reproduced here:

"Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years, let each have the right of taking another husband and wife; let them have the right to separate and marry again."

There has been much difference of opinion in the Courts of Burma on the question whether, assuming that the provisions of the text have been complied with, the marriage is ipso facto dissolved at the expiry of prescribed period, or whether there must be also some act of volition by the aggrieved party showing an intention to treat the marriage as at an end. Prior to 1906 it had been held that the marriage was automatically dissolved

upon the expiry of the prescribed period of desertion (38) but in that year a Full Bench of the Chief Court, in the case of Thein Pe v. U Pet (39) decided that some further act of volition was essential. So the law stood until 1927, when Thein Pe's case was in turn overruled by Ma Nyun v. Mg. San Thein (40) and the original position restored.

The Full Bench of the Chief Court of Lower Burma and the High Court of Judicature at Rangoon arrived at opposite conclusions on the question as they differed in the interpretation of the provision "they shall not claim each other as husband and wife; let them have the right to separate and marry again."

The more correct translation of this provision, as Adamson, C.J., has pointed out in Thein Pe v. U Pet (41) is, "They may not say, 'you are my husband', 'your are my wife' let them have the right to divorce and marry again." The Burmese text being " ၎ လင်ငါ့ ယော၊ ဇနီ သော၊ ကြာ ပိုင်ဖန ပိုင်ဇ၀, and the defect in the translation appears to have been one of the causes of the difference of opinion.

Fox, J., observed in his dissenting judgement in Thein Pe v. U Pet (42),

"The imperative words of the text are followed by the words 'let them have the right to separate.' These words no doubt

---

(38) Ma Thet v. Ma San On, (1903) 2 L.B.R. 85; Po Maung v. L.H.R.L.P.N. Nagalingum Chetty, (1894) 11 UBR 53.
(39) (1906) 3 L.B.R. 175. (40) (1927) 5 Ran. 537 (F.B.).
(41) (1906) 3 L.B.R. 175.
(42) (1906) 3 L.B.R. 175.

seem to imply that the result of the conduct at the end of the year (43) is merely to give a right to divorce at the option of either party, and that something must be done by at least one party after the period before the marriage will be actually dissolved. Reading them however with the rest of the text, I do not think that this is the true meaning. Prima facie they are unnecessary, for the parties have already separated. The intention in inserting them may have been to render lawful after the year what has been unlawful previously. In any case it appears to me that the most important part of the text is the injunction not to claim one another as husband and wife, and the words giving each the right to take another spouse, as in the case of a husband deserting his wife for three years, there is nothing making it compulsory for either the husband or the wife to communicate his or her intention to be no longer bound by the marriage tie, or to do anything indicating such intention."

On the other hand Adamson, C.J., observed therein:

"In my view this section does not in any way support the proposition that desertion is ipso facto a dissolution of

---

(43) Thein Pe's case dealt with the question of divorce on the ground of desertion by the wife, for which the Dhammathats prescribe a period of one year, but the questions under consideration were, whether at the end of the prescribed period any act of volition by the deserted spouse is necessary to put an end to the marriage must depend upon the same factors, whether the deserted spouse is the husband or the wife.

marriage. I am unable to follow my learned colleague Mr. Justice Fox in regarding the section as containing a mandate of the law giver enjoining a husband or wife who conduct themselves in the manner stated in the section not to consider or claim one another after the periods stated as husband and wife. In my view the section merely directs that the party in fault shall not claim the other against the other wish. Nor do I think that any such inconsistency as that pointed out by my learned colleague, viz. that a woman although still married to one man, has a right to marry another, can possibly arise under the provisions of the section. The right given is first to divroce and then to marry again. The right to marry again appears to have been introduced into the section merely as a visible symbol of the fact that the marriage tie has been dissolved. Whether the dissolution can be accomplished by a mere act of volition, as the section seems to imply or whether it would require some more formal action, is a question which in the present case does not concern us. But it appears to me that the latter of the law requires that there shall be at least an act of volition. In sections 301 and 312 of volume II of the Digest of Burmese Buddhist Law there are extracts from many Dhammathats. They vary in details, but in the main principle they agree. On the one side is the husband or wife who is in fault, on the other is the wife or husband who has been deserted. They give to the party who is sinned against the right to be no longer bound by the marriage tie. But in no

case is it suggested that there can be a dissolution of marriage except at the desire of a party to the marriage."

Maung Ba, J., who wrote the leading judgement in Ma Nyun v. Maung San Thein (44) observed:-

"As regards the last phrase, 'let them have the right to divorce and marry again' I do not agree with the learned C.J. that it implies that either party has still got to do something to sever the marriage bond. In my opinion it simply means that dissolution of marriage has resulted and that they can take advantage of it. The learned C.J., was also influenced by the consideration that the relationship should come to an end by mere desertion though one of the couple might not wish it or might wish a divorce. The Manugye is not without a remedy for such cases. It penalises the party who wishes to separate when there is no fault on either side. (Book 12, section 3)."

In another case it is hinted at, but not actually decided, that the dissentient judgment of Fox, J. in Thein Pe's case is the correct exposition of law on the point and that desertion by a husband of his wife for twelve years, during which period he failed to maintain her, is sufficient to constitute a divorce (45).

In the case of Ma Saw Kin v. Mg. Tun Aung Gyaw (46) the Judicial Committee of the Privy Council refused to express

---

(44) (1927) 5 Ran. 537 (F.B.).
(45) Mg. Shwe Sa v. Ma Mo, (1922) 1 B.L.J. 24.
(46) (1927) 6 Ran. 79; a case not referred to in S.A.S.Chettyar
(continued on next page)

an opinion on the point on which the two Full Benches had differed; but their Lordships did draw attention to the fact that in such a serious matter as the severance of the marriage tie the provisions of the Dhammathats must be strictly construed and fully complied with, and that unless both conditions, namely desertion and failure to furnish maintenance, are satisfied, the marriage tie must be considered as subsisting.

The converse case of desertion by the wife was considered in S.A.S.Chettyar Firm v. U Maung Gyi (47) and it was held that if the wife deserts her husband, the marriage becomes automatically dissolved at the end of one year from the date of desertion, strictly so called.

Although the decision in Ma Nyun's case may be based on a correct interpretation of the relevant text of Manugye, it is submitted that it would be inconsistent to recognise the automatic dissolution of a marriage by desertion and to withhold recognition of the right of divorce on mere caprice, for Rutledge, C.J., and Carr, J., who were members of the Full Bench that decided Ma Nyun's case, expressed the view in Ma Kin v. Maung Po Sein (48) that automatic dissolution of marriage on the expiry of the prescribed periods, is, in essence, a divorce at will. Moreover, with the advance of civilization, and from contact with Indians and British, the

---

(46) continued from the last page:
Firm v. U Mg Gyi, (1936) 14 Ran. 329 in which Ba U, J., said the law on this question was not quite settled.
(47) (1936) 14 Ran. 329.
(48) (1927) 6 Ran. 1.

Burmese came to regard the institution of marriage as more permanent than it has been regarded in former centuries when Burma was to a great extent isolated from contact with foreign countries. The new sanctity attaching to marriage was recognised not only by those who ~~entered~~ acquired ~~on~~ the marital status but also by the public authorities entrusted with the duty of administering the customary law of the country. We find in the Rescript of King Bodawpaya issued in 1146 B.E. (1784 A.D.) an order to this effect (49):-

"If either the husband or the wife desires to separate from the other, against whom no fault can be imputed, but simply because there is no love between them, decision will be made against the party wishing the separation who shall also undergo corporal punishment."

It will be noted that the rescript ranks twenty-seventh in the list of thirty-four Dhammathats digested by the Kinwun Mingyi and published at least thirty-two years after Manugye.

U E Maung (50) pointed out the anomalies that would arise from the recognition of automatic dissolution of marriage at

---

(49) U E Maung, Burmese Buddhist Law, 80; Digest II, sec. 255. A Royal Rescript was only effective during the reign of the King who issued it, but this indicates that, even before the British conquest, public authorities in Burma were not disposed to give effect to the rules in the Dhammathats which permitted divorce against the wish of a faultless spouse.

(50) Burmese Buddhist Law, 88.

the conclusion of the periods prescribed after desertion in the following terms:-

"A wife may not divorce her husband at will even on surrendering all her interests in the joint property; yet she may by leaving the husband and keeping out of his way for a year obtain a dissolution of the marriage and claim at the expiry of the period partition on the basis of a divorce by mutual consent. A decree for restitution of conjugal rights will be illusory; for if only the party against whom the decree is passed can evade the process of law for the prescribed periods, he or she may then come forward and claim that the decree has become inoperative. That Ma Nyun's case has resulted in loosening the bond of marriage between Burmese Buddhists, undoing the work begun by King Bodawpaya in his Royal Rescript of 1748 A.D. is clear from the case of Nga Aye v. King Emperor (51). It was claimed that the wife, who has successfully evaded her husband's enquiries of her whereabouts for one year, is competent to contract a valid marriage with another man; after Ma Nyun's case, the claim is irrestible."

In Daw Khin Pu v. Dr. Tha Mya, (52) the question whether there could be an automatic divorce without any act of volition on the part of the deserted spouse was referred to a Full Bench of the High Court of the Independent Republic of Burma. It was

---

(51) Criminal Appeal No. 238 of 1935.
(52) (1949) B.L.R. 285.

pointed out that the question had been further complicated by the fact that Gledhill, J. had stated in U Thein v. Ma Khin Nyun (53) as follows:-

"The rule in section 17 Book V of Manugye, is to be found in the older Dhammathats and was formulated by Burmese jurists who could not have contemplated the existence of a Criminal Court with powers to make and enforce orders that a husband should pay a monthly sum for his wife's maintenance. It is a rule which provides that, subject to conditions indicated, a husband may rid himself of his wife by making it clear that he has no lover for her and repudiates his responsibilities towards her. If he is compelled by force or fraud to put her in possession of money for her maintenance, he does not, to any mind, 'contribute' towards her maintenance, in the sense in which that word is used in the rule. It was held in Daw Pwa May v. Ma Thein Mya (54) that acquiescence in the deserted wife occupying and enjoying the rents of part of the estate was a 'contribution' and I am prepared to go as far as to say that a voluntary payment of an instalment in accordance with an order of Court is a 'contribution', but I do not think that the realisation of such money by distrain is, and I am positive that neglect to comply with a maintenance order is not a contribution to the wife's maintenance".

---

(53) B.L.R. (1948) 108.
(54) (1937) A.I.R. Ran. 255.

It was further pointed out that the combined effect of Ma Nyun v. Maung San Thein (55) and Geldhill, J.'s ruling is as follows:-

"A man who deserts his wife may have an order for maintenance passed against him under section 488(1) of the Code of Criminal Procedure or a decree for maintenance passed against him in a civil suit. But if he refuses or fails to comply with the order or the decree for a period of 3 years, the marriage will be dissolved automatically and he will be released from all further liability to pay maintenance allowance even though the wife has done all she could to recover maintenance allowance from him during that period; (2) maintenance allowance may have been recovered from him in execution of the order or decree, and (3) the wife does not want the marriage to be dissolved. They cannot but have the undesirable effect (1) of putting a very high premium on the matrimonial offences of desertion and failure to give maintenance allowance, (2) of encouraging and rewarding contumacy in the form of non compliance with orders or decrees for payment of maintenance allowances."

The validity of the rule enunciated in Ma Nyun v. Maung San Thein (56) as also the dicta of Gledhill, J., in U Thein v. Ma Khin Nyunt (57) being doubted by the Divisional Bench of

---

(55) (1927) 5 Ran. 537 (F.B.).
(56) (1927) 5 Ran. 537 (F.B.).
(57) Criminal Revision No. 1748 of 1946, in the High Court of Judicature at Rangoon; (1948) B.L.R. (108).

the High Court in Daw Khin Pu v. Dr. Tha Mya (58), a reference was made to a Full Bench composed of Thein Maung, C.J., Tun Byu, San Maung, Aung Tha Gyaw and Bo Gyi, JJ.

Thein Maung, C.J., observes (59) "The principle requirement of the Dhammathats appear to be that the husband must inform the wife that he does not love her or that he does not want her as his wife any more in order that there may be no doubt as to his intention in leaving her or as to the date from which time should run against him. The mere fact that the husband does not call upon the wife to return to and cohabit with him, after she has instituted legal proceedings for maintenance against him, does not necessarily indicate that he does not want her as his wife anymore and it cannot have the same legal effect as expressly declaring or informing her that he does not want her as his wife anymore. He may have abstained from doing so for some other reason, e.g. because he knows or feels that the wife has a just and sufficient cause for staying away from him." He further said, "In the present case we have been able to interpret the Dhammathats as we have indicated above without straining their language and by merely comparing their provisions with one another and examining them in the light of the general principles of the law of marriage."(60). It was accordingly held (1) that in case of

---

(58) (1949) B.L.R.285.
(59) Ibid.
(60) Daw Khin Pu v. Dr. Tha Mya (1949) B.L.R. 285 at 307.

desertion and failure to give maintenance or to have any communication for the prescribed period, the marriage is not dissolved automatically. Desertion by either party for the prescribed period merely renders the marriage voidable at the will of the deserted spouse. The marriage tie is not dissolved without an act of volition on the part of the deserted spouse showing his or her intention to determine the marriage relation or in the words of U May Oung, "without conduct revealing a desire for divorce on the part of the deserted party."

U San Maung, J. observes, (61) "Besides, the notion that the offended spouse must acquiesce willingly to the fact of an automatic divorce having been accomplished by the mere fact of his or her being deserted for the prescribed period by the other spouse seems to run counter to the beliefs and customs of the Burman Buddhists of today. As observed by Irwin, J., in Thein Pe v. U Pet (62) the law to which the Burman Buddhists are subject is not the law of the Dhammathats, but the customary law, for the ascertaining of which the Dhammathats are a very important guide, but not the only guide." He further said,(63) "Apart from the Dhammathats which appear to agree in the main principle of giving the right to the aggreaved party as against the offending party, the view that automatic dissolution of

---

(61) Daw Khin v. Dr. Tha Mya, (1949) B.L.R. 285 at 311.
(62) (1906) 3 L.B.R. 175.
(63) (1949) B.L.R. 285 at 312.

marriage takes place by desertion and lapse of time seems foreign to the idea of modern Burman Buddhists. It would indeed be a sad commentary upon our legal system if we are constrained to admit that in so far as marriage and divorce are concerned the common law which governs the lives of the Burman Buddhists is unreasonable: as indeed it will be of the principles of automatic dissolution of marriage by desertion and lapse of time is admitted. The anomalies arising from treating the marriage as automatically dissolved without the aggrieved party having any choice in the matter are serious. Therefore, even assuming that section 17 of Manugye, Book V, is authority for the proposition that there is automatic dissolution of marriage on the offended spouse being deserted for the prescribed period, we would be justified in following the more equitable principles as laid down in the other Dhammathats which merely give the offended spouse the right to treat the marriage tie as dissolved. After all as pointed out by Page, C.J. in Ma Hnin Zan v. Ma Myaing (64) while great value is attached in Burma to the rulings in the Manukye, Burmese Jurists do not regard these Dhammathats as sacrosanct."

Bo Gyi, J., observes, "Both the letter and the spirit of the Buddhist law, as will have been seen from the leading judgment, are inconsistent with the view that desertion in

---

(64) (1935) 13 Ran. 487 at 491-492.

the conditions envisaged in Manugye, Book V, section 17 works an automatic dissolution of the matrimonial tie. Even if it were otherwise, modern Courts would not favour a construction which would enable a defaulting party to take advantage of the conditions brought about by him. In this connection I would draw attention besides the authorities cited by my Lord, to the rulings in Maltins v. Freeman (65) and New Zealand Shipping Co. Ltd. v. Society Des Alelians Et Charters De France (66). The effect of these decisions has been admirably summarized in Anson's Law of Contract on pages 11 and 12 where the learned author says, "There may also be cases in which in certain circumstances 'void' must be practically construed as voidable. A contract or a statue may declare that in a specified event a transaction shall be 'void' or null and void; but a party whose own wrongful act or default has brought about the avoidance of the transaction is never permitted to allege its invalidity and so take advantage of his own wrong. The operation of this rule in effect gives the innocent party an option whether he will or will not insist on the provisions in the contract or statute that the transaction shall be void; and it is therefore for practical purposes equally true to say that the transaction is void against the party in default or voidable at the option of the other".

---

(65) 4 Bingham N.C. 395.
(66) (1919) A.C. 1.

These principles are founded on natural justice and are equally void in Union of Burma (67)".

It is noteworthy to point out that the High Court, in propounding its answer, sought to equate 'an act of volition' with 'conduct revealing a desire for a divorce on the part of the deserted party'. With this amplification the High Court was in general concurrence with the majority views in Thein Pe's case (68). It may then be asked what difference exists between divorce by desertion and divorce by mutual consent.

(2) It was further held that payment of maintenance in compliance with a Court order is a 'contribution to her maintenance within section 17, Manugye, Book V. So is maintenance realized by execution of decree. It was pointed out that Gledhill, J. (as he then was) appeared to have laid too much stress on the word "contribute", but the actual word used in most of the Dhammathats is ပေး (give) without any qualification, i.e. as to whether the husband should give it voluntarily and the Court cannot read any such qualification into them.

(3) The question whether the husband who did not comply with an order of maintenance can plead his own default and claim the marriage dissolved does not arise because the right to treat the marriage as dissolved is only given to the aggrieved party (69).

---

(67) Daw Khin Pu v. Dr. Tha Mya (1949) B.L.R. 285 at 315-6.
(68) (1906) 3 L.B.R. 175.
(69) Daw Khin Pu v. Dr. Tha Mya, (1949) B.L.R. 285.

A second appeal was subsequently made to the Supreme Court as it raised a problem of major importance in Burmese Buddhist Law (70) on which a Full Bench of the High Court of Lower Burma in Thein Pe v. U Pet (71) and a Full Bench of the High Court of Judicature at Rangoon in Ma Nyun v. Maung San Thein (72) had been at issue. E. Maung, J., who delivered the judgment discussed all available authorities touching the point. He maintained that the Dhammathats rules relating to desertion have their origin in the Hindu Law. He contended that Manugye is not of the paramount authority and is not entitled to the supreme position among the Dhammathats to which following the Privy Council in Ma Hnin Bwin's case (73) the learned Judges composing the Full Bench in Ma Nyun v. Mg. San Thein (74) have elevated it. It is therefore necessary to make a full examination of the relevant texts in the other Dhammathats before the point at issue can be correctly determined. The Sonda text at section 312 of the Digest makes it essential that the wife who has deserted her husband should be requested by several persons to change her mind before the husband can take advantage of her default ၆ လ သံ ဝ ဆို ၇ ၊ ဝ နှစ် ပတ် လုံး ၊ ထိ နှ ဟု ၊ ဝ ည် ၆ ဝ ဦး ၊ does not mean "let him continue to cohabit with her for a year" as rendered

---

(70) Dr. Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108 (S.C.)
(71) (1906) 3 L.B.R. 175.
(72) (1927) 5 Ran. 537 (F.B.)
(73) (1918) 8 L.B.R. 108.
(74) (1927) 5 Ran. 537.

in the official translations. It is more correctly "let her retain her status as a wife for one year". The texts from Myingun, Manuyin, Rasi, Vicchedani, Pañaam, Kungyalinga, Warulinga, Kyeto and Kyannet Dhammathats collected at section 395 of the Digest treat the matter in the same way. These texts do not imply an automatic dissolution of the marriage relation, regardless of the volition of the parties thereto. Dhammavinicchaya (or Dhamma) as cited in the Digest, the second text from Rasi, the first Manuvaṇṇanā text, Kyannet and Manu refuse to make the dissolution of marriage depend upon the husband or the wife leaving the other spouse in anger or after a quarrel or from loss of affection for the other spouse. They make the mutual consent of parties (evidenced, it may be, by partition of their assets and liabilities or otherwise) a sine qua non for the dissolution of marriage. Manugye stands alone in the body of Dhammathats rendering unnecessary the volition of the deserted spouse to effect dissolution of marriage tie. It is against all principles of equity and good sense that the wrongdoer should be enabled to found on his own wrongful act a right against an innocent party.

E Maung J., further pointed out that in Ma Nyun v. Maung San Thein (75), the text from Kaingza and Shwemyin, were relied upon, and the other texts in the section are not apposite to

---

(75) (1927) 5 Ran. 537 (F.B.).

the problem. The incorrect official translations and the reading of texts isolated from their context led Maung Ba, J. into the error of thinking that those texts were relevant, though they relate to an entirely different situation and deal with the case of a daughter, whose parents have engaged to give her in marriage to ဝေါဟာရ a stranger who comes from a distant place to trade. The relevant passage in its entirety reads:-

"Where a stranger trader on payment of bridal presents to the parents but without making definite engagement cohabited with the daughter and later goes away, the daughter comes again at the disposal of the parents; but if he goes away, having made a definite engagement to return having placed before the parents property, slaves, food, etc., for the daughter's maintenance, the parents are not entitled to resume her. She shall wait his return for three years. If he fails them to come back she is at liberty to take a husband. But if that stranger dies within these three years, and his younger brother shall come to the house of the daughter, he can have her to wife only if and when he has discharged all her debts and liabilities."

The Supreme Court, therefore, held (76) that the view expressed in the Full Bench case of Ma Nyunt v. Maung San Thein (77) that where a Burmese Buddhist husband deserts his

---

(76) Dr. Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108 (S.C.).
(77) (1925) 5 Ran. 537.

wife and for three years neither contributes to her maintenance nor has any communication with her the marriage tie is automatically dissolved is incorrect. Such conduct on the part of the husband evidences his desire for dissolution of the marriage bond; and cannot in itself suffice to dissolve the bond created by mutual consent of the husband and wife. For that bond to be dissolved it is necessary that the wife reciprocates the desire; and the reciprocation may be express or implied from conduct clearly pointing in that direction.

The ruling of the Full Bench (78), inter alia, that money received by the wife for her maintenance, whether the husband was constrained to pay the same by reason of a decree or an order of a Court or whether the funds were realized by execution of a decree or order for payment of maintenance, is contribution by the husband within the meaning of Manugye, Book V, section 17, was not seriously canvassed at the hearing of the appeal in Supreme Court and it may, therefore, still be regarded as good law.

It remains to consider what is meant by "desertion" in Burmese Buddhist Law. The Indian Divorce Act 1860 (79) has defined desertion as 'implying an abandonment against the wish of the person charging it.' The Hindu Marriage Act 1955 (80)

---

(78) (1949) B.L.R. 285.
(79) Section 3(9).
(80) Section 10(1).

in sub-section (1) of section 10 says it is "desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the neglect of the petitioner by the other to the marriage." This is probably an adoption from the definition in Halsbury's Laws of England (81): "It is desertion of one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart for two years or more." But this definition is not exhaustive. Desertion is not the withdrawal from home, but from the state of affairs relating to the matrimonial alliance or contract. The question of desertion cannot be decided by merely enquiring which party left the home first (82).

Sometimes the desertion may be constructive and not actual. It is constructive where one spouse is forced by the conduct of the other to leave home (83), for example, the wife being obliged to separate from her husband owing to his adultery with a concubine in his house (84). Even if the adultery has not been in the house, a wife is not bound to stay with husband, who persists in adultery (85). The person who intends bringing the cohabitation to an end and whose conduct in reality causes its termination (86), commits the act of

---

(81) (2nd Edition) Vol. 16., para. 988.
(82) Khorshed v. Muncherji, (1937) 39 Bom. L.R. 1141.
(83) Graves v. Graves, (1864) 3 S.T. 516.
(84) Roi v. R. Naik, (1930) Mad. 140.
(85) Sickret v. Sickret, (1899) P. 278.
(86) Edwards v. Edwards, (1948) P. 268.

desertion (87). Where the husband turns his wife out of the home, it is the husband who becomes the deserting spouse. This is known as "constructive desertion." Actual turning out of wife is not essential; it is essential, if by his conduct he compels her to leave the house (88). In constructive desertion the respondant must be shown to have been guilty of conduct equivalent to an expulsion of the petitioner from the home and to have done so with the intention of bringing the matrimonial consortium to an end (89). This intention can be inferred from the surrounding circumstances and a man must be presumed to intend the natural consequences of his acts (90). Such conduct must be of a 'grave and weighty 'character' (91). Where the wife never consented to live apart and was willing to cohabitation, but the husband never made any attempt to set up a matrimonial home, the court held it to be desertion even though there had been no previous cohabitation and the marriage had never been consumated (92). Where the wife refused cohabitation on her discovering husband's adultery, the husband was held guilty of constructive desertion (93). In a recent

---

(87) Sickret v. Sickret,(1899), P. 278; Thomas v. Thomas,(1924) P. 194.
(88) Charter v. Charter, (1901) 65 J.P. 246.
(89) Buchler v. Buchler, (1947) P. 25.
(90) Edwards v. Edwards, (1948) P. 268; Simpson v. Simpson (1951) P. 320.
(91) Pike v. Pike (1853), 3 W.L.R. 634 (C.A.).
(92) Delaubenque v. Delaubenque, (1898) 68 L.J.P. 20.
(93) Garcia v. Garcia, (1888) 57 L.T.P. 101.

case decided under the Hindu Marriage Act 1955, the Madras High Court held that the deserting spouse could be the one who made joint life impossible and so compelled the deserted spouse to go. The list was not abandonment but the fact that the other spouse had brought it about by conduct of which it was a natural consequence (94).

Hence, under the English and Indian Laws, there may be desertion even while the couple are actually living in the same house, and even when the deserted spouse is the one who leaves the matrimonial home. The Courts will, therefore, review the whole conduct of the parties in order to ascertain whether there has been desertion or not and which spouse is, in law, the deserting party (95). But it appears that desertion at Burmese Buddhist Law is understood in a more limited sense. The wording of section 17 of Book V of the Manugye which is reproduced in section 312 of the Digest clearly imply that the spouse who voluntarily leaves the matrimonial home is the deserting party. The spouse who leaves under the compulsion of the other is not guilty of desertion (96). It has been held that neither the imprisonment of a husband for twelve years (97), nor the separation of a wife from her husband for over a year, where such separation was due to the latter's cruelty (98)

---

(94) Rangaswami v. Aravindanimal A.I.R. (1957) Mad. 243.
(95) K.P. Saksena, The Hindu Marriage Act, 1955, 198.
(96) O.M. Mootham, Burmese Buddhist Law, 39.
(97) Aung Gyu v. Thet Hnin, (1914) 8 L.B.R. 50.
(98) Ma Thein Me v. Mg. Po Gywe, (1917) 10 B.L.T. 212.

is sufficient to constitute desertion. To constitute desertion, the following ingredients must also exist:

(1) there may be express intimation given to the other spouse by the deserting spouse at the time of leaving him or her that his or her intention in so doing is to sever the marriage tie;

(2) the specified periods of one year and three years must have elapsed from the date of separation where the deserting spouse is the wife or husband respectively;

(3) the husband must neither have contributed to her maintenance nor have communicated with her throughout the aforesaid specified periods; (99)

(4) the deserted spouse, as possibly only the deserted wife, inasmuch as failure, to maintain may be regarded as implying an intimation of the husband's desire to break the marriage tie, at or after the conclusion of the prescribed period, must have reciprocated the desire to dissolve the marriage; and the reciprocation may be express or by conduct clearly pointing in that direction (100).

(b) Husband becoming a monk.

The first act of a Buddhist who wishes to take holy orders is 'leaving the house' i.e. the abandonment of his home and goods. This abandonment creates a ~~continual~~ unilateral rupture of social

---

(99) Digest II, sec. 312.
(100) Dr. Tha Mya v. Daw Khin Pu, (1951) B.L.R. 108 (S.C.).

ties, and creates a situation which, like all situations of its kind, raises important legal difficulties. Two questions of particular difficulty present themselves (i) what becomes of the marriage of the ordained bhikku, (ii) what becomes of his abandoned goods?

TheAncient India, where marriage is in principle indissoluble, the pabbajja could only involve a separation in fact, without any special legal incidents attaching to it. Since a widow is not allowed to contract a marriage in the strict sense of the word (101) it is evident that the mere 'departure' of the husband cannot give the deserted woman her liberty; legally she is still the wife of the monk. The Shriti allows the wife of a person who has been admitted to a religious order to contract a second marriage inferior in status to, and conferring fewer legal rights than a marriage between a man and a spinster, but it is unlikely that this solution will be applied to the wife of the Buddhist bhikku (102). The Brahmanical pravrajya, which is similar from the religious point of view, otherwise differs profoundly from the Buddhist institution so that it appears impossible to attach to the latter the effects recognised by the former. The pravrajya is infact a civil death which breaks absolutely all attachment

---

(101) R. Lingat, The Vinaya and the Civil Law (Vinaya et Droit Laique) Bulletin de L'eiole Franscaise d'Extreme Orient (1937),415.

(102) R. Lingat, Vinaya et Droit Laique, B.E.F.E.D. (1937) 416.

to the world of the laity, and the law, so far from restoring to his former civil status, as does the Burmese Buddhist Law the person who abandons the religious order, punishes severely the hermit or mendicant who breaks his vows (103). But initiation into the Buddhist order does not create a final status; the Buddhist medicant may always return to the temporal world without dishonour, and the revocable character of his vows is of the essence of the Buddhist priesthood, an indispensable condition of the efficacy of the vocation. To regard his marriage as dissolved or only impeilled is to place on the will of the prospective ordinand a constraint incompatible with the object of Buddhist ordination, which is not to imprison the monk in his resolution once taken, but to lead him progressively to a final renunciation. It is only after experience has confirmed his wish, after he has reached the status of arhat, that one can consider his attachment to the world completely broken, and that society can treat his deserted wife as a widow or as the wife of a hermit. The position seems to be that custom has introduced a period of probation after the husband has taken his vows during which the fate of the marriage is left in suspense. This corresponds to the periods provided by the Dhammathats in the case of the prolonged absence of the husband on business, and the case of

---

(103) Nārada, v. 35; Vishnu, v. 152; Mayne, (VII) 800-811.

the husband who has gone on pilgrimage. It seems probable that the Dhammathat texts to this effect were adapted from the Dharmasastras (104).

Though Buddhist legends may hold up to admiration the wife who remains faithful to her husband who is absent or who has joined the Sangha, it is to be remembered that the so-called Burmese Buddhist Law is in fact the customary Law of South East Asia, and while it displays here and there the influence of Buddhist principles, its purpose was mainly to record actual custom. The Burmese woman might admire and revere the woman of the legends, but the jurists know that the most they could expect of a woman whose husband had taken religious vows or gone on a pilgrimage or business trip was to wait for a reasonable time in which he might return to her before taking another mate.

The question whether a marriage is dissolved if the husband becomes a monk is dealt with in only a few Dhammathats. What are regarded by Forchhamer and others as the earlier Dhammathats do not discuss the subject at all (105). Wagaru which is, according to Forchhammer, the oldest known Burmese Code of Law contains no rule concerning the effect of ordination on a marriage previously contracted by the Monk. Forchhammer accounts for this by describing Wagaru as a laic Dharmasastra

(104) Nārada, XII, 97-100.
(105) R. Lingat, Vinaya et Droit Lique, B.E.F.E.D. (1937), (415-477).

reclothed in a Buddhist guise to make it acceptable to Burmese people. Assuming this to be correct one would expect to find the author applying Dharmasastra rules governing Hindu institutions to corresponding institutions in Burma. Wagaru ordains (106) that the wife whose husband has left her to prosecute his studies ought to wait 6 years before remarrying. This rule is obviously designed to preserve the marriage, while not completely depriving the wife of her liberty, and is a rule which can be adopted to the case of the woman whose husband has taken religious vows. Before remarrying she must wait sufficiently long for the husband to prove the strength of his vocation. In a society in which marriage is easily dissolved (Wagaru admits divorce by mutual consent and allows deserted wives to remarry after 3 years), it is difficult to suggest a solution more favourable to the interests of religion which would be acceptable to the people.

Among the later Dhammathats which deal with the subject, there is a conflict of opinion. The relevant rules are to be found at section 411 of the Kinwun Mingyi's Digest, Volume II, and section 321 of the Attasankhepa. They all, in fact, agree in allowing the wife, whose husband had left her to become a monk, to remarry, absolving her and her new husband from the penalty of her adultery. But the majority of them add that the wife ought to be restored to her former husband

---

(106) Section 46.

if he, on learning of her conduct, quits the Order and wants her to return to him. Kungya even requires the second husband to pay costs if he has compelled the first to bring an action to establish his rights (107). This makes the fate of the second marriage precarious, for it depends on the will of the monk, who can, at any moment, pronounce it a nullity, and constrain his wife to resume cohabitation with him. But not all the Dhammathats impose on the monk's wife the perpetual threat of annulment of her second marriage. Pyu-min allows the Monk a period of 8 years in which to enforce his rights calculated from the time when he learns of his wife's conduct. After this period has elapsed, the wife is finally attached to her new husband. Clearly the intention is not to influence the freedom of choice of the Monk, but simply to confirm the renunciation, henceforth final in his mind. But Pyu-min's solution failed (108). It is only found again in Sonda, a work of secondary importance and later date (109). Most authors rejected the expedient of a period of convenient as it was, and have sought to fix, by a psychological test the moment when the Monk has finally triumphed over his old attachments. According to the story of Citahatta (110) "The monk who discards his robes resumes his place in the home. Citahatta, who returned to temporal life six times

---

(107) Digest, II, sec. 411.
(108) R. Lingat, Vinaya et Droit Laique, B.E.F.E.O. (1937), 415-477.
(109) Digest, II, sec. 411.
(110) Burlirgarne, II, 13-15.

naturally takes the road home each time, and as naturally each time his wife receives him as her husband." According to Manuvaṇṇanâ (111):-

"When a man has abandoned his wife to enter the Order, another man may take her to wife without penalty. But if the first husband, knowing the fact, leaves the order, the wife should be given up to him. If a man enters the Order eight successive times, after having cast off his robes 7 times, his wife is free from blame; she has the right to live with another husband if she wishes, but she ought to wait till her husband has quitted the Order 7 times."

This solution which the author of Manuvaṇṇanâ claims to have drawn from ancient texts, and which perhaps originates in the story of Cittahatta above appears to have been popular for a long time among Burmese jurists, for we find it in Manosâra, Kaingza-Shwemyin, Kandawpakeṇakalinga, Vinicchayarâsi, Râjabala, Manu, Pâṇaṁ Pakiṇṇaka and Manucittara (112), though some of these writers require the husband to leave the order eight times and others seven. The solution in Manuvaṇṇanâ (in the translation adopted above) explains this slight difference. The husband must have discarded his robes seven time and it is his subsequent ordination (the 8th) which finally puts an end to his marriage. A similar uncertainty (between

---

(111) Section 108; J.Jardine, Notes on Buddhist Law, III, 2. (somewhat different from U Gaung's Digest II, sec. 412)
(112) Digest II, sec. 411.

the numbers 6 and 7) appears in the story of Cittahatta.

One can only admire the ingeniousness of this formula in reconciling apparently contradictory intentions. The marriage is preserved as long as possible, and the monk, until he has shown an irresistible leaning towards the monastic life, is never déprived of his right to return to his home. Further, the wife is not condemned to a period of waiting which can be idefinitely prolonged, she is permitted to live with another man, though the union is precarious.

We find another solution, equally inspired by the principle of maintaining the marriage in the Dhammathat analysed by P. Sangermano (113). It is stated in these terms:- "If the husband has gone on Imperial service, or from religious motives, his wife may not abandon the home, although she is without means of subsistence. If the husband, on his return, finds her living outside the house, he can obtain satisfaction by having recourse to law, and the judge may order a separation for 3 years or divorce if the husband requires it." Two new traits appear here. First the departure of the husband for religious reasons i.e. the pabbajja is assimilated to his departure on royal service. Next, if the marriage is maintained in principle in the husband's absence, the principle is not rigorously applied. The ex-monk whose wife has remarried has the choice between divorce (which, being granted for his

---

(113) Description of the Burmese Empire (Rome) 1833, 205, XI.

benefit, gives him a great advantage) or an order to the wife to resume her place in the home after a delay which may extend to 3 years, and at the end of which, in default of execution, the separation is automatically converted into a divorce. The author obviously seeks to bring about the return of the original spouses to their life together. He takes care to leave to the husband the initiative for a rupture. If the husband wishes to preserve the marriage, it give him a long period in which to overcome the resistance of his wife. But in the end if she persists in her refusal, and he believes he can go no further, it finalises the separation of the spouses.

Notwithstanding the anxiety of the jurists to impose on the people a rule which preserves the marriage of the husband who turns monk, the rule has not found ready acceptance, and it is unlikely to find favour with the religious for it does not conduce to observance of the canon law. Strictly according to the Vinayas, the adoption of the religious life as a rahan involves a renunciation of the world. One of the four cardinal and irremediable sins a rahan can commit is sexual commerce, and the status of a rahan is on principle inconsistent with his having a claim on the woman, who was his wife. The Dhammathats above noticed, therefore, represent a concession to the custom that has grown up; the custom, of a Buddhist man becoming what is known as a "dullaba" rahan (114).

---

(114) U E Maung, Burmese Buddhist Law, 90.

The opposite rule, that ordination dissolves the marriage, is laid down in Manugye and Dhammavinicchaya, both compiled in the reign of Alompra. Manugye says:- (115)

"If a husband who has a wife becomes a Rahan, she must wait seven days; if after seven days, the Rahan shall return to the world, he shall not claim her as his wife; let the wife have a right to take a husband." The effect of the rule is either that ordination dissolves the marriage, or at least gives the wife the right to put an end to it. It is unlikely that the delay of 7 days is imposed on the wife to allow the religious novice to make sure of the strength of his vocation. It is more likely that the period of seven days is intended to cover the period of instruction involved in taking the vows on ordination. It would seem probable that the author of Manugye devised this solution to the problem after rejecting the rule in the earlier writers, which might result in the woman being drawn to and fro between two men, and which he regarded as repugnant to the moral standards of his time.

It should be mentioned that though Cittara gives the rule that the husband may quit the order eight times and resume cohabitation with his wife, notwithstanding that she has taken another mate, he has another rule whereby the wife is at liberty to remarry eight years after the husband has become a monk (116).

---

(115) Manugye Book V. sec. 17. The extract from Dhammavinicchaya is in Dig. II, 411.
(116) Dig. II, 411.

Notwithstanding that the texts of Manugye and Dhammavinicchaya say that seven days after her husband becomes a monk he shall no longer have the right to claim her subsequently as his wife, there are decisions of the Courts in Burma indicating that ordination does not ipso facto put an end to the marriage. An early decision (117) held that unless the wife re-marries, the husband is obliged to support her. It seems to follow from this decision that the husband is not free, on returning to temporal life, to regard the marriage as dissolved, if the wife has waited for him, and wishes to resume conjugal relations. The question also arises whether the rule in Manugye could be invoked when the husband has undergone ordination solely for the purpose of putting an end to the marriage. It would seem probable that the answer is that the rule only applies if the husband has taken orders in good faith, intending at the time to embrace the religious life permanently.

There is authority for the view that intention at the time of ordination is a highly relevant factor. All young Burmese males of good family undergo the shinbyu ceremony which involves entering the order for a few days. It has been held that no renunciation of the world is involved where a Buddhist male enters the religious order for a limited period,

---

(117) Ma Thin v. Maung Maung, (1899) P.J. 611.

at the end of which he intends to re-enter civil life and resume his original position in that life (118). As there is no case with facts to which the rule in Manugye would apply, it is not possible to say that the Courts would apply the rule when the husband entered the Order with the intention of remaining in it permanently, and the wife subsequently remarried.

5. Divorce for a matrimonial fault.

(a) Fault on the part of the husband.

A divorce cannot be had merely because one of the parties has no love for the other or does not comply with the desire of the other (119). There can be a divorce at the instance of one party on account of some matrimonial fault, recognised by the Dhammathats, in the other (120). Such a divorce can be obtained only by recourse to the Courts. (121)

Of the various matrimonial faults recognized by the Dhammathats, as sufficient for a divorce, several have become obsolete. The acts recognized by the Courts as constituting matrimonial offences entitling the injured party to apply to have the marriage dissolved are, in the case of the husband, cruelty, and in certain circumstances, taking a second wife

---

(118) U On Kin v. Daw On Bwin, Civil First appeal, No. 156 of 1935, of the High Court of Rangoon; O.H. Mootham, Burmese Buddhist Law, 137.
(119) Maung So Min v. Ma Ta, (1892) S.J. 610.
(120) Maung So Min v. Ma Ta, (1892) S.J. 610.
(121) Ma Me Hla v. Mg. Po Thon, (1929) 7 Ran. 98.

without the consent of the first; (~~122~~) in the case of the wife adultery is a ground for divorce (122).

It is to be noted that adultery by the husband is not a sufficient ground for divorce (123).

The list of offences enumerated in the foregoing section is not exhaustive, the Court having power to add to it any offence recognized by the Dhammathats as a sufficient ground for divorce (124) provided, it is submitted, that such offence is one which is ~~a~~also recognized as a matrimonial offence by the customs now prevailing in Burma.

We now turn to a consideration of the several offences.

(i) Cruelty

In England, cruelty is a ground for divorce in favour of either spouse. Under section 2(a) of the Matrimonial Causes Act 1937, "A petition may be presented .... on the ground that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty." Previously, cruelty combined with adultery was sufficient to support a wife's petition for divorce, and curelty alone sufficient to support a wife's petition for a judicial separation (125). Cruelty is not defined in the statute, but as was held in Horton v. Horton (126) the word was obviously intended to have the same meaning as had been assigned to it in the cases decided before the Act. The Royal Commission on Marriage and Divorce proposed

---

(122) O.H.Mootham, Burmese Buddhist Law, 39. (123) Ma Ein v. Te Naung, (1907) 5 LBR 87; Ma Thein Nwe v. Maung Kha, (1929)7Ran. 451. (124) Mg. SonMin v. Ma Ta,(1892) S.J. 610.
(125) A. Gledhill, Cruelty as a ground for divorce at Burmese Buddhist Law, Bulletin of SOAS, Vol. XIII, part 2, 1950, 434.
(126) (1940) P. 187.

that the concept of cruelty should continue to be defined by precedent and not by statute (127).

Cruelty might conceivably be defined objectively, that is to say solely with regard to the effect upon its victim; but it would still be necessary to define the extent of the bodily or mental injury which should be recognized as sufficient to justify the Court in granting relief. Alternatively, it might be defined subjectively, that is to say, in addition to the effect upon the victim, there must be another essential element, the state of mind of the person who causes the injury; it would then be necessary to define also the state of mind which the law regards as an essential element of 'legal cruelty'. (128)

---

(127) The Royal Commission on Marriage and Divorce under the chairmanship of Lord Morton of Henryton, whose Report was published in March, 1956, made a great many recommendations, some of a highly controversial nature on which the Commission was far from unanimous, and others dealing with comparatively minor but none the less valuable points. A debate on the Report took place in the House of Lords on the 24th October, 1956. There would not appear to be any immediate likelihood of Government legislation on the Report. Many of the Commission's recommendations do not require legislation - Rayden, Practice and Law in the Divorce Division, (1957), supplement iii.

(128) A. Gledhill, Cruelty as a ground for divorce at Burmese Buddhist Law, Bulletin of S.O.A.S. Vol. XIII, part 2 1950, 434.

With respect to the extent of the injury necessary to constitute a ground for relief, Lord Herschell said in Russel v. Russel (129) that it did not include every act of cruelty in the ordinary or popular sense; to qualify for relief in the divorce court, there must be bodily hurt or injury to health or reasonable apprehension of one or other of these.

In Astle v. Astle (130) the husband, in the first year of the marriage, committed a series of violent assaults upon the wife, but by reason of unsoundness of mind he was, in the language of the McNaghton rules, "incapable of knowing the nature and quality of his acts." He was certified insane, but discharged in the same year. Four years later he approached the wife, who was living apart, and shouted that, though she thought herself safe, she would not live much longer; he was then sufficiently sane to know what he was doing.

For the wife it was argued that cruelty was to be judged solely from the view of the sufferer, reliance being placed on Kirkman v. Kirkman (131) where Lord Stowell had said, "The persons of both parties must be protected from violence ..... If that safety is endangered by violent and disorderly affections of the mind; it is the same in its effects as if it had proceeded from mere malignity alone" but it was conceded that, if intention was a necessary element, there was

---

(129) (1897) A.C. 395.
(130) (1939) P. 415.
(131) 1 Hagg. Con. 409.

no cruelty in the first year of the marriage.

Henn-Collins, J., conceded that in no case in the Probate Division had the rule in McNaghton's case has been applied, but he observed that in no other court would the respondent be criminally or civilly liable for the incidents which occurred in the first year of his marriage. How then could his conduct be an offence in the Divorce Court, whose jurisdiction was not discretionary and, if exercised, would alter his civil status?

Though it was not strong, there was an indication in the use of the word 'treated' in the statute that the action must be conscious. There was, further, the presumption that the statute did not create an exception from the general rule of law.

He was, however, able to grant the wife a decree, because the threat in the fourth year of the marriage was uttered wilfully and consciously, and, in consequence of the husband's past conduct, caused a reasonable apprehension of hurt.

Had there not been, in this case, this escape from the operation of the rule laid down, it is probable that the wife would have appealed basing her case on Kirkman v. Kirkman (132).

In the following year Horton v. Horton (133) came before the courts. This was a husband's petition based on a succession of spiteful acts by the wife causing damage to articles

---

(132) 1 Hagg. Con. 409.
(133) (1949) P. 187.

he treasured. The petition was granted, and the rule laid down was that the question for determination was whether the wife had committed wilful and unjustifiable acts, inflicting pain and misery upon the husband, which had caused him pain or injury to his health, or reasonable apprehension of such hurt or injury. In this case again, mens rea was established, and the necessity for questioning the necessity of proving it did not arise.

In the case of Squire v. Squire (134) the wife, who was devoted to her husband, but in low physical and mental health, made such exacting demands upon the husbands time and service as to injure his health. There was here no question of any conscious intention of causing injury to the husband, and the petition was dismissed on the ground that cruelty, to afford ground for relief, must be deliberate, malignant, or intended. In the Court of Appeal the husband succeeded, and the rules laid down in Astle v. Astle (135) and Horton v. Horton (136) were rejected. Tucker and Evershed, L.JJ. based their decisions on the principle that, in considering what amounts to cruelty for the purposes of section 2(a) of the Matrimonial Causes Act 1937, a party is to be presumed to intend the natural conseqnences of his or her acts.

In Jamieson v. Jamieson (137) Lord Reid reserved his opinion as to the position where a respondent was not

---

(134) (1949) P. 51. (135) (1939) P. 415.
(136) (1940) P. 187. (137) (1952) A.C. 525.

deliberately ill treating the petitioner, and of the application, in those circumstances, of the maxim that a man intends the natural and probable consequences of his acts. In Fowler v. Fowler (138), Hodson, L.J. said, "The word 'cruel' itself, in its ordinary meaning, seems to me to imply the notion of malignity, but it is not necessary to prove affirmatively an intention to be cruel if the acts themselves readily allow that inference to be drawn ..... When acts are not such as to render that inference readily to be drawn, the Court will look to see whether there is intention to injure ....." In the same case, Denning, L.J. said that if a man takes contraceptive measures against the will of his wife, whether by means of an appliance or by caitus interruptus, so as to prevent her having any children, without reasonable excuse for so doing, then it is easy to infer that he does it with intent to inflict misery on her.

In Cooper v. Cooper (139), a husband pleaded guilty to, and was convicted of, an indecent assault upon the child of his marriage. His wife's complaints to the justices of persistent cruelty and desertion based upon the admitted assault upon the child, and certain misconduct towards her, were dismissed, the justices preferring the evidence of the husband, where there was a conflict and holding that there

---

(138) (1952) 2 T.L.R. 143, A.C.
(139) (1955) P. 99.

was no evidence to show that the assault upon the child had been committed with the intention of causing his wife pain, nor in her presence. It was held that the assault, which was an offence which must by its nature go to the very root of the marriage relationship, was one which any man of ordinary intellectual capabilities must have known, had he pasued to reflect, to be likely to cause the gravest distress to the mother of the child, his wife, and possibly severe injury to her health. It was also said that an actual intention to injure is not an essential averment in cruelty, although in a 'doubtful' case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty. The above rule was applied in Crawford v. Crawford (140).

At Mahommedan Law the husband's right to repudiate the wife without cause, which is an essential element of the marriage contract, makes comparisons with other systems difficult, but, while the husband has also the right to chastise the wife without causing serious injury (which is, in India and Egypt, abrogated by statute), the wife can claim the protection of the court against his cruelty. It is only the Maliki school which recognizes cruelty as giving the wife a right to ask for dissolution of the marriage. As the practice

---

(140) (1956) P. 195.

appears to be to appoint two arbitrators, one from each side of the family, to determine who is at fault, it would seem that what constitutes cruelty must be regarded as a question of fact. Analogy to other branches of the law would suggest that the criterion will probably be objective, and the right which the Shariya gives to the husband to administer such chastisement as does not cause fracture, wound or serious bruise, would suggest that English and Burmese wives can complain of cruelty earlier than their Mahommedan sister (141).

There are provisions in the texts of the Dhammathats cited in sections 223 and 273 of the Kinwun Mingyi's Digest, Volume II, recognising the husband's power of moderate chastisement with a split bamboo or a length of rope. Even in the early days of the British period it was thought that striking the wife only once (142), or pulling the wife by her hair and abusing her (143) were not sufficient grounds for a divorce. But the husband's power of moderate chastisement of the wife is not tolerated by British Courts (144), and hence a physical assault by him may be a matrimonial fault.

The relevant extracts on the subject of cruelty as a ground for divorce are in Vol.II, section 303. They all require the wife to forgive a first offence: the husband should

(141) A.Gledhill, Cruelty as a ground for divorce at Burmese Buddhist Law, Bulletin of SOAS, Vol.XIII, part 2, 1950, 437.
(142) U May Oung, Leading Cases on Buddhist Law, 109; S.C. Lahiri, Burmese Buddhist Law, 83.
(143) Mi Pa Du v. Mg. Shwe Bauk (1897) S.J. 607.
(144) Ma Naing v. Maung Nyun, (1907), 1 B.L.T. 136.

be made to agree that he will not repeat it, on pain of divorce with forfeiture of all the property. But most of them say that if the wife refuses to accept such an arrangement, a divorce may be granted as by mutual consent with equal division of assets and liabilities. Some of them, perhaps unnecessarily, add that if the husband also desires a divorce, he can have it on surrendering his property rights, and Ketujas Manu is unique in saying that, notwithstanding the husband's undertaking in the first proceedings, the injured wife is not to have the benefit of the condition imposed on the husband, even if she is obliged to file a second petition, but the divorce shall be as by mutual consent.

The extract from Manugye is in Vo.XII, Chapter 3, and runs as follows:-

"If under the same circumstances, the husband having taken a lesser wife, shall abuse and beat his first, and if it be proved that he has in any way oppressed her, let them go together again and live on good terms. If having gone together again, the husband shall behave in the same way, let him leave the house with only one cloth, and let him pay all the debts.... but if the wife says she does not wish to remain with him any longer, that she wishes to separate, let them do so; let the property belonging to both be equally divided between them and though the husband declares his unwillingness to separate, let the divorce be made as if both

were consenting. This Manuo said."

The extract comes from a chapter headed "The law for the Partition of the Property on Divorce (145) when the husband and wife are the children of nobles (officials)", but it is set out in the 28th chapter that the law for the children of nobles is the law for all.

The Kinwun Mingyi's own Dhammathat, the Attasankhepa, puts the rule in a section (393) dealing with divorce where the spouses belong to the ruling class. It is there set out that it does not necessarily follow that a decree for divorce should be given because the husband has once only treated the wife with the hot tongue or the strong arm (hnot pu let kyan pin pyu). "They should coninue to live together as man and wife, a bond being executed by the husband to abstain from the repetition of such conduct, but, if the wife refuses to continue to live with the husband, let them be divorced as if by mutual consent. If, after reunion, the wife is dissatisfied with the husband and again desires divorce, let it be as if by mutual consent. If the husband refuses to enter into the bond and desires divorce, let it be governed by the law appropriate to the case when the husband has committed a matrimonial fault. Again, if, after reunion, the husband fails to observe the conditions of the bond, let there be divorce according to the law governing the case when the husband has committed a matrimonial fault.

---

(145) The word used by Richardson is "separation", but the proper English equivalent is "divorce".

It would seem then that the authors of Manugye, like Kettuja the author of Manu, has unnecessarily restricted the scope of the rule to the case of the husband who ill-treats the wife after taking a second (146).

The rule is stated to apply only in the case of cruelty by the husband to the wife; it would be arguable that, having regard to the comparatively egalitarian attitude of the law towards the sexes in matrimonial matters, the same rule should apply in the case of cruelty by the wife. There are extracts in section 304 of Vol. II of the Digest providing for criminal punishment of either spouse for cruelty to the other, but it must be conceded that the two Dhammathats from which extracts are cited in this section are of uncertain date, authorship, and consequent authenticity (147). One might, however, call in aid sections 309 and 310 of Vol. II of the Digest which provide criminal punishment as well as forfeiture of property in the case of either spouse for neglect of the other who has suffered a reverse of fortune or become physically incapacitated.

In the official translation of section 303, the word "cruelty" is used in most extracts, but "ill-treats" occurs in Manugye and Manu, and the courts have been disposed to draw a distinction between these words which, it is submitted by Professor Gledhill, there is little in the original texts to justify. It is possible that the extract from Yazathat was

---

(146) A. Gledhill, Cruelty as a ground for divorce at Burmese Buddhist Law, Bulletin of SOAS, Vol.XIII, part 2, 1950, 438.

(147) A. Glehill, Curelty as a ground for divorce at Burmese Buddhist Law, Bulletin of S.O.A.S., Vol XIII, part 2, 1950, 438.

the first exposition of the rule and it seems only to contemplate cognizance of a petition if the wife has been subjected to physical violence of a kind calculated to cause bruises at least. Manugye contemplates personal physical violence combined with verbal abuse and oppression. In Manu the relevant words are "hnyin sai ngya", which, it is believed, involve the notion of physical violence, but apparently imply less ferocity than the words used in Yazathat.

While, it is submitted, it is difficult to conclude that the Dhammathats lay down any clear criteria of the objective aspect of cruelty as a matrimonial fault, obviously the maxim de minimis non curat lex must apply. In Mi Pa Du v. Maung Shwe Bauk (148), it was found that the husband had struck his wife only once and a divorce was refused. Futon, J.C. said, "Petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce."

The punishment provided in the Dhammathats for the spouse deserting the partner in trouble or sickness indicates, it is submitted, that the notion of "mental cruelty" was accepted by the Burmese jurists, and the decision in Mg. Po Aung v. Ma Nyein (149) that a false allegation of adultery persisted in by the husband, if the wife was seriously hurt by it, might

---

(148) (1898) S.J. 607.
(149) (1904) 10 B.L.R. 132.

amount to cruelty in the legal sense, though not expressly by anything in the Dhammathats is not open to criticism (150). Any kind of mental torture of an unbearable nature may be classed as legal cruelty. Communication by the husband of venereal disease to his wife, amounts to legal cruelty (151). According to a decision in Rev. Po Tun v. Ma Chit (152) under the Indian Divorce Act, 1869, the conviction and imprisonment of a husband or wife for an offence against the Criminal Law is no justification to the other party for refusing to live with him or her, and however painful it may be for a respectable man to have a wife who has been convicted of a serious offence, such conviction does not justify him in deserting her. This principle of law should also apply to the Burmese who are governed by the Burmese Buddhist Law. However, it is submitted that where a husband has been criminally convicted and the disgrace and shock to the wife are such as to cause a breakdown in her health, he can be adjudged guilty of legal cruelty. That is so under the English Law (153).

The rule in Section 303 that the wife is not ordinarily entitled to a decree for dissolution on her first complaint of cruelty might conceivably be regarded as a particular instance of the principle inherent in pre-British Burmese judicial practice, as in Mahommedan procedure, that litigants

---

(150) S.O.A.S. Bulletin Vol. XIII, Part 2, 1950, 433 at 439.
(151) Hardless v. Hardless,(1933) All. 56.
(152) (1939) Ran. ~~L.R.~~ 1.
(153) Thomson v. Thomson, (1901) 85, L.T. 172.

should be induced, if possible, to settle and there is included in section 303 a rescript of King Bodawpaya in 1874, forbidding dissolution in all matrimonial cuases on a first complaint unless the defendant desires it (154).

If this is to be regarded as a rule of adjective law, it is not altogether easy to disentangle it from the rules of substantive law in which it is embedded, when the whole is imported into a system which does not recognize the efficacy of that rule of procedure, once a court has seizin of a cause, and the conflicting decisions which have been based on section 303 are inevitable.

The Courts in Upper Burma early accepted the principle, more obviously in conformity with the extracts in section 303, that a single act of cruelty by the husband entitles the wife to a divorce. In Ma Gyan v. Mg. Su Wa (155) Burgess, J.C., though obiter, said, "But on the other hand, it is equally clear that the wife is not bound to give her husband another chance; she can insist on her claim to divorce at once. If she takes the latter course, she has a right to a half share of the property, while if she prefers the former and her husband offends again, she gets the whole of it. And this is the rule even although the misconduct of the husband may be of a mild type." The rule was followed in the subsequent decisions of Maung Pye v. Ma Me (156) and Ma Sat. v. Maung Nyi Bu (157).

(154) S.O.A.S. Bulletin, Vol.XIII, Part 2, 1950, 433 at 439.
(155) (1897) II U.B.R. (1897-01) 28.
(156) (1902) II U.B.R. (1902-3) B.L. Div. 6. (157) (1929) 7 Ran. 790. ~~(158) (1913) 7 LBR 79. (159) (1929) 7 Ran 790.~~ 4 U.B.R. 68

In Lower Burma the same principle was first enunciated in the case of Maung Po Han v. Ma Talok (158) and Ma Sat v. Mg. Nyi Bu (159). But, it was held in Ma Ein v. Te Naung (160) that a single act of cruelty by the husband - even coupled with an act of adultery under the conjugal roof - was not such cruelty as would entitle the wife to a divorce.

It is submitted that, if the main rule of the Burmese jurists was that on the first proved complaint of cruelty, the wife's petition should be dismissed, but the husband condemned in costs and bound over not to repeat his misconduct, there must inevitably be a subjective or mental element in the cruelty of the nature affording a ground for relief at Burmese Buddhist Law, because it means that when the husband is condemned to loss of property rights as well as status, on the ground that he is guilty of the matrimonial fault of cruelty, he has caused mental or bodily injury to the wife, wilfully and knowingly, despite an undertaking to abstain from it.

In Mg. Kywe v. Ma Thein Tin (161) it was held that a single assault by a husband on the wife, provoked by the wife, is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition 'of the offence'. In this case the parties had

---

(158) (1913) 7 L.B.R. 79.
(159) (1929) 7 Ran. 790.
(160) (1907) 5 L.B.R. 87.
(161) (1929) 7 Ran. 790.

had several quarrels, but in the only one urged by the wife as amounting to cruelty, she had seized a bag of onions and tried to wrench it from her husband, who had overpowered and struck her. It was the kind of case of which one is tempted to say intuitively, and without reflection, that it was without merits. In Burma, as in England, the development of the law is, to some extent, conditioned by the kind of case in which the courts have to deal with unsettled points. Sir John Baguley, who heard the appeal, was not prepared to follow Po Han v. Ma Talok (162) and could not accept the view that, if the wife insisted on a divorce on the ground of a single act of cruelty, she could have it on the terms of a divorce by mutual consent, but her right to a divorce on these terms, is, it is submitted, a substantive right recognized in six out of eleven extracts in section 303, and though Bodawpaya's rescript forbids a decree on first complaint of a matrimonial fault, it is perhaps doubtful whether it would have the force of law after the end of Bodawpaya's reign. A treaty entered into by a Burmese King was not regarded by the Burmese as binding on his succesor. Manugye (Vol. VII) cites sixteen classes of cases including assault, but not matrimonial causes, in which the demise of the crown puts an end to the plaintiff's right of suit. The extract from the

---

(162) (1913) 7 L.B.R. 79.

Kungyalinga, which purports to have been written 19 years after the rescript, but still in the reign of Bodawpaya, does not mention the Rescript's restriction on the right to claim dissolution on the first complaint, and Attasankhepa ignores it.

Baguley, J., (163) went on to remark that, in the reported cases, cruelty had often been used as a synonym for "physical violence" and he observed,

"Cruelty really depends on state of mind of the person inflicting pain rather than the actual infliction of the pain. Naturally, a series of assaults which result in pain would warrant the deduction that the person inflicting that pain was indifferent to the pain that was being inflicted; but if an assault is regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, or pleased with, the pain he was inflicting. I entirely agree with the proposition laid down by May Oung in his work on Buddhist Law, namely, 'there must be at least evidence of such ill-treatment as shows that the husband is a man of violent tendencies,' to which I would add that the ill-treatment is likely to recur. A divorce is given, not to punish a husband for an assault; that is provided for by the criminal law, but to enable the wife to free herself from a bond which bids fair to become intolerable."

---

(163) Mg. Kywe v. Ma Thein Tin, (1929) 7 Ran. 790.

It is submitted, with great respect, that this would be more appropriate to the interpretation of the words used in a statute. Where the word "cruelty" is used in the "translations" of the Dhammathats extracts, it is a portmanteau word, with no precisely and completely corresponding word in the original. A principle in conformity with what is set out in the Dhammathats cannot by so direct a process be formulated (164).

This was, however, the first recognition of the mental attitude of the offender as an essential element in cruelty, and Baguley, J.'s view that a series of assaults, which the Dhammathats contemplate as affording ground for divorce with forfeiture of the offender's property rights, warrants the deduction that the person inflicting the pain must be indifferent to the other's sufferings.

This case was decided before Astle v. Astle (165), so Baguley, J.'s view cannot have been influenced by English decisions. It is submitted that "delight in another's pain" is much the same criterion as that laid down in Squire v. Squire (166).

The last reported case on the subject is Daw Pu v. Mg. Tun Kha (167) where it was sought to draw a distinction between ill-treatment and cruelty. In this case the wife had

---

(164) A. Gledhill, Cruelty as a ground for Divorce at Burmese Buddhist Law, Bulletin of the SOAS, Vol.XIII, Part 2, 1950, 433 at 441.
(165) (1939) P. 415. (166) (1949) P. 187.
(167) (1946) Rgn. 125.

been assaulted and abused on several occasions by her husband, so that she was unable to live with him, and in such a manner as to excite the sympathy of the Court, and the question was whether he was to be deprived of his property rights. The judgment by Sir Mya Bu was based on section 303 of Vol. II of Digest, and it rejected the extracts from Manu and Manugye as inapplicable to the case. Ma Ein's case (168) was overruled and Po Han's (169) approved, Baguley, J.'s definition of cruelty being adopted and enlarged. Mya Bu, J. said,

"It is unfortunate that in many of these cases the word cruelty has been used as though it were interchangeable with the term "physical violence". The two in my opinion appear to be quite distinct. The essence of cruelty does not consist in violence. 'Cruel' is defined in Chambers Dictionary as 'Disposed to inflict pain, or pleased at suffering, void of pity, merciless, savage; severe; and in the concise Oxford Dictionary the word 'cruel' is defined as 'Indifferent to, delighting in, another's pain'. Therefore, cruelty really depends on the state of mind of the person inflicting pain rather than the actual infliction of the pain, Naturally, a series of assaults which result in pain would warrant the deduction that the person inflicting that pain was indifferent to the pain that was being inflicted; but if an assault is regarded as a single act of cruelty, the assault must in itself

---

(168) (1907) 5 L.B.R. 87.
(169) (1913) 7 L.B.R. 79.

be such as to warrant the assumption that the person committing it was indifferent to, or pleased with, the pain he was inflicting."

Sir Mya Bu further said, (170),

"There is a distinction between mere ill treatment or personal violence and cruelty. In order to constitute cruelty, ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference or delight in pain caused to the sufferer."

Therefore, where a spouse is 'guilty of cruelty only once' the other party is entitled to divorce. In such case partition of the property of marriage will be as in case of divorce by mutual consent. But where cruelty is aggravated by the fact that instead of being repentant, the guilty party is desirous of divorce or by the fact that it is committed with intent to make the other party seek a divorce, or by other facts such as frequent repetition of acts of cruelty or grievous hurt within the meaning of section 320 of Penal Code, the party guilty of such cruelty will be deprived of his or her share of the joint property on divorce. Here, Mya Bu, J. stressed the provisions in the extracts from Vinicchaya and Pakâsani in section 303 that if the husband, guilty of cruelty, desires a divorce, the wife has the right to demand that he forfeit property rights, and held that the wife should enjoy a

---

(170) Daw Pu v. Maung Tun Kha, (1946) Rgn. 125.

similar right against a husband who had treated her cruelly with intent to make her sue for divorce.

It is submitted that, on the facts of this case as reported, such an intention could only be imputed to the husband by application of the rule that a man is presumed to intend the natural consequences of his own acts, which presumption would almost inevitably be rebutted by his conduct in defending the petition.

It was remarked that frequent acts of cruelty, or (obiter) the infliction of grievous hurt, might also entitle a wife to divorce on the same terms, a proposition which, it is submitted, needs further examination and restatement.

According to Professor Gledhill (171), the important development effected by this case was the treatment of the prohibition in the Dhammathats against granting a decree on first complaint as a particular instance of a rule that the wife who has grounds for complaint should allow a locus poenitentiae to the husband before claiming a divorce involving loss of the husband's property rights. Mya Bu, J. said that patience on the wife's part, coupled with a failure by the husband to improve his conduct, might be sufficient for this purpose; whether the opportunity of repentance was adequate would depend on the facts of each case.

---

(171) Bulletin of the School of Oriental and African Studies, Vol. XIII, Part 2, 1950, 433 at 441.

It is submitted that this view of the matter receives support from the way the rule is stated in Attasankhepa (172). The underlying principles of Burmese Buddhist Law have to be extracted, not without difficulty, from the examples of their application given in the texts, and a Burmese judge can claim a greater freedom in departing from the letter than an English judge usually allows himself; Mya Ba, J.'s treatment of the rule, not as a rule of procedure, but as a rule of substance, has enabled him to restate it and give it effect in the new system.

In Ma Thein Mya v. Maung Tun Hla (173), the husband had not treated his wife well, but his conduct did not amount to legal cruelty. It was held that the wife was entitled to divorce on payment of costs and forgoing claims to the joint property though the husband did not consent. This seems to re-echo ex-parte divorce and it is submitted that it should not be followed.

In order to prove cruelty, it should be possible to point to some words or actions as constituting it. A charge of matrimonial cruelty is a serious matter, nontheless serious when it is made against a medical man, and it is for the party who makes such a charge to prove it if it is denied(174). If he or she fails to prove it, a court of law is bound to

---

(172) Section 393.
(173) (1922) 11 L.B.R. 385.
(174) Dr. Tha Mya v. Ma Kin Pu, (1941) Ran. 81 at 85.

presume that it is unfounded. The cause of action in respect of which a married woman according to Burmese Buddhist Law sues her husband for a divorce on the ground of his cruelty is distinct and different from the cause of action in respect of which the woman, no longer married, sues for a declaration that the marriage has ceased to subsist owing to desertion by one or the other party. Consequently the dismissal of the first suit for want of prosecution does not operate as res judicata in the second suit (175).

Though there is old reported case in which a Buddhist husband sought divorce on ground of his wife's cruelty, it is submitted that a Court might be induced to accept cruelty by the wife as a matrimonial fault, for Dhammathakyaw maintains that either spouse guilty of wanton cruelty to the other shall be criminally punished, and Kyannet says that the wife who behaves disrespectfully to her husband shall be publicly chastised and forfeit her rights of inheritance (176).

The law on this subject, in Burma as in England, is still developing, but the present position may, it is submitted, thus be briefly summarized (177):-

(1) Cruelty as a ground for divroce is only available to the wife.

(2) Unless the husband has rejected a proffered locus poenitentiae, the partition of the property willlbe as on

---

(175) U Sin v. Ma Ma Lay,(1941) Ran. 14.
(176) Digest II, sec. 304.
(177) Bulletin of the S.O.A.S., Vol.XIII, Part 2, 1950, 433 at 441-2.

divorce by mutual consent.

(3) If the cruelty complained of comprises physical violence, the effect upon the wife must be such as would afford ground for a successful criminal prosecution.

If it consists of mental pain, it must have been caused without reasonable excuse, and the wife must have been seriously hurt.

(4) The physical violence or mental pain must have been caused either malignantly, or at least with the husband's knowledge that his conduct was calculated to cause pain, and with his indifference to that knowledge.

(5) If cruelty as defined above is established, and the locus poenitentiae is rejected, the husband forfeits property rights as on a divorce for a matrimonial fault.

(ii) Taking a Second Wife.

Inasmuch as the right of polygamy has been judicially affirmed by their Lordships of the Privy Council, (178) it was at one time held that the taking of a second wife did not entitle the first wife to a divorce (179). But in Maung Hme v. Ma Sein a Full Bench of the Chief Court of Lower Burma laid down the rule that, subject to the exceptions of the kind mentioned in sections 219, 232, 265-7 and 311 of U Gaung's Digest, i.e. when the chief wife is barren or bears

---

(178) Mi Me v. Mi Shwe Ma, (1912) 39. I.A. 57.
(179) Ma In Than v. Mg. Saw Hla, (1881) S.J. 103.

only daughters or suffers from leprosy or some similar disease, or if she is immodest, a chief wife whose husband without her consent takes a second wife, is entitled to a divroce (180). A chief wife is not debarred from claiming a divorce even if she does so a couple of months after her husband's remarriage (181). It is to be noted that in case of such a divorce the division of property should, in the absence of a contract to the contrary, be made as in the case of divorce by mutual consent (182). The justifiable causes mentioned above which entitle the husband to take another wife without committing matrimonial fault are as follows:-

The texts in section 219 of the Digest deal with five kinds of wives who may be put away, viz. (1) a barren wife, (2) a wife who gives birth to daughters only, (3) a wife who is leprous, (4) a wife who does not behave according to the rules of conduct governing her class, and (5) a wife who has no lover for her husband.

Only the text from Manugye cited in section 232 of the Digest gives the husband the right to take a second wife. It says, "The husband should on his part, attend upon and carefully look after his wife who may become leprous, insane, comsumptive, maimed, blind or paralysed. He may cease to have conjugal realtions with her, and take a second wife, but shall not put her away altogether after taking all the property."

---

(180) (1918) 9 L.B.R. 191 (F.B.).
(181) Mg. Hme v. Ma Sein, (1918) 9 L.B.R. 191 (F.B.).
(182) S.C. Lahiri, Burmese Buddhist Law, 82.

The texts in section 265 of the Digest only permit a husband to put away a barren wife after the lapse of eight years.

Section 266 of the Digest contain the texts which authorize the husband to put away a wife who has borne eight or ten daughters but not a single son.

According to the texts in section 267 of the Digest the husband of a woman suffering from leprosy, epilepsy or some other disease of like nature must try his best to cure her of the disease before putting her away, and only when it proves to be incurable, may he marry a second wife.

Section 311 of the Digest appears to deal with the right of husband to take a second wife when his first wife is suffering from any longstanding disease other than the diseases mentioned in section 267. Except those from Dhamma and Cittara, the other texts cited there definitely say that the consent of the ailing wife must be obtained before the husband remarries. It will be seen that the Dhamma and Cittara texts citedtin sec. 311 give the husband the right to take a second wife, if the first wife suffered from the diseases mentioned in section 267, and it would seem that they would have been more appropriately placed in sec. 267 rather than in section 311. The Kyannet text cited in section 311 gives the husband the right to take another wife without the consent of the ailing wife only after he has made three requests for

permission to do so which have been refused.

It is very doubtful, however, whether the Courts will uphold the husband's claim to take a second wife on the grounds that his wife is barren or that she has borne him female children only (183). In an unreported case (184), the husband pleaded his wife's barreness as an excuse for taking another wife. Heald and Rutledge, JJ., after stating that it was very doubtful if at the present day, the wife would be deprived of her right to divorce the erring husband, merely because she was barren, held that even if the rule is not obsolete, the husband cannot exercise the right till at least eight years of married life have proved barren. It is, moreover, worthy of note that the Manugye and Manucittara texts at section 220 of Kinwun Mingyi's Digest, Volume II, make it clear that an unproductive marriage is not conclusive proof of the wife's barrenness. It is at best very doubtful if Burmans at any period in their history regarded with consternation or disquietude the absence of children; the rule is one of those obtained fron foreign sources and did not appear to have been assimilated (185).

It may also be said that the prejudice against female children was never real among the Buddhists. This view finds support of the religious authority cited in the Manugye (186):

---

(183) U E Maung, Burmese Buddhist Law, 70.
(184) Special Civil Second Appeal No. 147 of 1925; U E Maung, Burmese Buddhist Law, 70.
(185) U E Maung, Burmese Buddhist Law, 71.
(186) Digest II, Sec.266; Manugye XII, 43.

"The above is the rule laid down in the Dhammathats, but according to the religious teachings, a woman who gives birth to daughters only cannot be said to be inferior among women. Because, during the life time of Gotama Buddha, Visâkhâ, Khemâ and Upalavanna, were born to King Kikî; and they distinguished themselves by remaining unmarried and devoting themselves to the practice of the religious precepts. Even a man would be accounted ignoble and worthless if he had no character, while a mere woman may be deemed noble and excellent if she is replete with virtue. The wise should take this also into consideration in deciding cases."

(b) Dissolution for a matrimonial fault (adultery) on the part of the wife.

Authority for the proposition that adultery on the part of the wife is a ground for divorce is to be found in sections 256 and 259 of Kinwun Mingyi's Digest, Volume II. Certain Dhammathats go further and deprive a wife who has been guilty of adultery of all her rights even if the husband does not take any action against her (187); but this is not consistent with the provisions of the Dhammathats permitting condonation (188).

Adultery by a wife will entitle the husband to a divorce (189), but adultery committed by the husband is not a ground

---

(187) Digest, I, 279; Attasankhepa, 276.
(188) Digest, II, 416.
(189) Mg. Pya Gyi v. Mg. Po Ka, (1916) 9 B.L.T. 74.

for divorce (190) unless, being coupled with ill treatment the misconduct amount to legal cruelty (191).

In Maung Pya Gyi v. Maung Po Kha (192), the wife committed adultery, admitted her guilt and left the conjugal home. Maung Kin, J., held that the husband was, in the circumstances, entitled to abandon her, and if he did so, the marriage was at an end as from the date on which she left the house. It is most respectfully submitted that this decision is incorrect. A more reasonable view was taken by Heald, J., in Ma Me Hla v. Maung Po Than (193) wherein it was held that adultery on the part of the wife does not ipso facto put an end to the marriage. The marriage tie subsists until it is dissolved by a decree of a Civil Court.

A Court may presume adultery where it is satisfied that a guilty attachment subsisted between the parties and that opportunity ocurred when a guilty intercourse might with ordinary facilities have taken place (194). If a husband leaves his wife because he believes her guilty of adultery he has three years from the date of his departure to sue for a divorce on the ground of adultery; if the wife leaves the husband he must sue within one year. After the lapse of the period of desertion which dissolves the marriage tie, the

(190) Ma Thein Nwe v. Ba. Hla, (1929) 7 Ran. 451.
(191) Ma Ein v. Te Naung, (1907) 5 L.B.R. 87.
(192) (1916) 9 B.L.T. 74.
(193) (1929) 7 Ran. 98.

(192) (1916) 9 B.L.T. 74.
(193) (1929) 7 Ran. 98.

(194) Maung Pya Gyi v. Maung Po Kha, (1916) 9 B.L.T. 74.

husband can no longer ever and prove adultery. To hold otherwise would be to permit the disputed question of the wife's adultery to be examined into many years after the marriage had been dissolved by desertion. If he cannot bring a suit of this kind after the lapse of the prescribed periods it follows that he cannot plead the wife's adultery in defence to a suit for divorce on the ground of desertion brought against him by the wife (195).

6. Misrepresentation.

Passages from some of the Dhammathats indicate that where the marriage was induced by misrepresentation the party deceived may in some circumstances avoid the marriage. Logically, where such a right exists in such circumstances, the marriage would either be void or voidable at the instance of the party deceived, and the remedy should be a suit for a declaration of nullity, the effect of which would be that in the eyes of the law the marriage tie had never existed, whereas, in a suit for ~~declaration~~ dissolution of marriage, the decree recognises the existence of the marriage tie up to the time of the decree. In a system which recognises divorce by mutual consent without the intervention of a Court, it is not likely that a ~~dissolution~~ distinction of this kind will be deemed of sufficient importance to justify it being drawn. There is no evidence in the texts

---

(195) U Sin v. Ma Ma Lay, (1941) Ran. 14.

that the Dhammathat writers recognised it, and the Courts have not sought to create it. Where a man by representing that he has no wife obtains the hand of a woman in marriage, and the former wife appears, according to Kaingzau he shall not claim to cohabit with the second wife, unless he gives up to the new parents-in-law a child or two by his first wife. In the absence of children by his first wife, Vannanadhamma declares that he must give up his first wife to the new parents-in-law, though the six other Dhammathats, including Kaingzau state that if he is given up by the first wife to the second wife, he becomes entitled to cohabit with the latter (196). Two instances only of the claim for a divorce on allegation of misrepresentation appear in the reports. In Ma Kin v. Maung Gale (197) the second wife's suit for divorce was decreed by the trial Court on the ground that she had proved misrepresentation by her husband; on appeal, however, it was held on the evidence that there was no satisfactory proof either of the fact that the husband was a married man at the time of the marriage with the plaintiff or of the fact that there was any representation by the husband or on his behalf which induced the marriage contract. Ashton, J.C., did not find it necessary to pursue the matter further than to state obiter that the wife's right to repudiate

---

(196) Digest, II, 91.
(197) (1895) P.J. 130.

the marriage appears to be lost with the consumation of the marriage. It is difficult to maintain that the texts cited in s. 91 of the second volume of the Digest assume that the second marriage has not been consumated. In Maung Po Nyun v. Ma Saw Tin (198) one of the grounds alleged by the wife in her claim for divorce was that she was induced to marry the husband by a misrepresentation that he had obtained a divorce from the first wife. Apparently, however, she did not consider it a grievous wrong, as she lived some time with the husband and sued for a divorce only when the husband had deserted her for three years. The divorce in the case was granted on the ground of desertion for three years by the husband.

The Dhammathats also impose a duty of the parents of the bride to disclose to the prospective son-in-law any physical or constitutional defect in their daughter, of which he could not have been aware, on pain of a penalty of double the value of the presents received from the bridegroom at the time of betrothal (199). Though with the exception of the Kyannet, the right of the husband to repudiate the wife on discovery of the concealed defects is not explicitly stated in the Dhammathats, it is clear that such a right is implied from the negative proposition that the husband may not repudiate

---

(198) (1925) 3 Ran. 160.
(199) Digest, II, 61.

the wife for defects of which he was aware before marriage.

It is submitted, however, that the rules relating to misrepresentation as a ground for voiding the marriage have long been obsolete (200). The rule which allows the husband to compound his fraud by giving up his children or first wife to the new parents-in-law belongs to an archaic state of society; only seven Dhammathats state the rule and Manugye significantly enough is silent. The Dhammathats carry their own refutation in regard to many of the concealed defects, for which the man may repudiate the wife. A woman may not, the Dhammathats declare, be said to be barren till eight years of married life have passed without children; leprosy, blindness, deafness, deformity and incurable disease stare a man in the face and the Dhammathats state that if the man takes the woman knowing that she has these defects, he may not thereafter repudiate her; insanity negatives the intelligent consent necessary for a marriage and a man cannot marry one who is not a woman (201). The only concealed defects that need consideration are, therefore, pregnancy in its early stages and loss of virginity.

Under the Hindu Marriage Act, 1955 (202) a marriage between Hindus is voidable on the grounds of idiocy, impotence, consent obtained by force or fraud and of the wife being

---

(200) U E Maung, Burmese Buddhist Law, 95.
(201) U E Maung, Burmese Buddhist Law, 95-6.
(202) Section 12(1).

pregnant by a third party at the time when the marriage was solemnised. Under the Special Marriage Act 1954, a marriage may be annulled by a decree of nullity if the marriage has not been consumated owing to the wilful refusal of the respondent to consumate the marriage(203). But section 12(2) of the Hindu Marriage Act 1955 provides that a petition for a decree of nullity on the ground that consent was obtained by force or fraud must be filed within one year after the force has ceased to operate, or the fraud has been discovered, and the Court has no power to condone the delay in such cases. In the case of pregnancy of the respondent by some person other than the petitioner, at the time of marriage, not only must the petition be filed within one year of the marriage, but the petitioner must prove that, at the time of the marriage he was ignorant of the wife's condition, and he forfeits his right to relief if marital intercourse takes place after he becomes aware of it.

The Dhammathats provide that, if the parents of a girl who is pregnant or suffering from a physical defect promise or give her in marriage, they are liable to punishment and to return the presents received, or, according to some, double their value. Kyannet moreover says the husband may repudiate her. Other texts in the same section of the Digest would

---

(203) Hindu Marriage Act (25 of 1955), sec. 12(1).

seem to put an impotent bridegroom in the same position (204). The case of the impotent husband is dealt with in the extract from Manugye cited in another section (205). The author puts him in the same category as the indigent, stupid, diseased, lazy, and debauched husband. The wife has the right to abuse him, and the author appears to assume that this will lead to a divorce by mutual consent.

This may, however, be a poor consolation for the bride wedded to a husband of an obdurate nature in such a condition. Though the Dhammathat writers do not seem to have considered the possibility of a suit for nullity, it is submitted that the Courts have inherent power to declare any act-in-law void. In all systems of law the essential purpose of marriage is cohabitation and the procreation of children, so that incapacity to perform the sexual act is a ground for a declaration of nullity.

The same might be said of a marriage, consent to which was obtained by force or fraud or consent of a spouse whose idiocy or insanity is such as to make it impossible for the afflicted person to understand the nature of the act-in-law, but, as it might happen that the Courts would not accept the submission here made, it is suggested that legislation is necessary to enable Courts to grant decrees of nullity in circumstances similar to those set out in the Hindu Marriage Act 1955.

---

(204) Digest II, sec. 61.
(205) Digest II, sec. 228.

7. Grounds for dissolution set out in Dhammathats but not recognised by the Courts.

Under section 270 of the Kinwun Mingyi's Digest, Volume I a man may divorce a wife like a master, a thief or an enemy, even though she may have borne him ten children.

The reason for the rule is given in Cittara, where the story of a treacherous wife, one like an enemy, is thus relate by way of illustration:

"Once upon a time a young man from Benares, named Culadhanuggaha, studied the arts and sciences under the renowned teacher at Takkasila. At the close of his studies and on the eve of his departue, he was given by the teacher a spouse whom he accepted, not daring to refuse. On their way home the couple met an elephant which the husband shot dead with an arrow. Resuming their journey they subsequently encountered fifty robbers, forty nine of whom he killed each with an arrow. Having spent all his fifty arrows he asked his wife to give him the sword with which he meant to kill the surviving robber. But the faithless wife, having become enamoured of the robber the moment she saw him, treacherously presented it in such a way that the handle was ready to the hand of the robber while the blade pointed towards the husband, and so the latter was slain. She then accompanied the robber, and at his request told him her past history. On coming to a river he swam to the opposite bank and went away leaving her in great distress and sorrow. Desiring to

teach her a lesson the embryo Buddha, who was then the Thagyamin, asked Deva Mâtali to assume the shape of a fish and Deva Pancathinga that of a kite, while he himself assumed the form of a fox and came near her carrying a piece of meat. Just then Mâtali, in the shape of a fish, jumped ashore. The Thagyamin immediately dropped his meat and tried, without success, to catch the fish. Almost simultaneously Pancathinga who had assumed the shape of a kite swooped down on the meat and carried it off. The whole occurence taking place in the presence of the woman, she remonstrated with the fox calling him a foolish creature. The Thagyamin thereupon replied that she it was who was foolish, because food was easy to obtain, whereas in her case she had lost her husband and had been deserted by her paramour. On hearing this, the woman realized the helplessness of her situation and was oppressed with much remorse."

The moral of the apologue is that to live with an unfaithful wife is like 'nourishing a viper in one's bosom' or, according to the Burmese proverb, ၀ မြွေ ၀ ဖမ်း ဘဝ ကိုယ် သေ ဥစ္စာ။ In other words, it is dangerous or unsafe to live as man and wife with an evil-minded woman even for a single day, and she should therefore be discarded by the husband before she has an opportunity of doing any harm (206).

---

(206) U. Tha Gywe, A Treatise on Buddhist Law, Vol. 1, 151.

The above ground for divorce has never been recognised by the Courts. It is submitted that it is too vague to merit fudicial recognition and it should not be accepted unless it is evidenced by some matrimonial fault.

8. Condonation.

Condonation in English law is more than forgiveness, and in a sense less. It is restoring the wrongdoer to the position in the matrimonial home which he was entitled to before discovery of the matrimonial fault, but it is conditional, the fault is revived not only by commission of the same fault again, but also by something less e.g. if adultery is condoned, improper conduct short of adultery will revive it (207). Such an offence need not necessarily be ejusdem generis as the original offence, e.g. adultery revives cruelty cruelty revives adultery (208). Beard v. Beard (209) and Richardson v. Richardson (210) establish the proposition that condonation is conditional forgiveness, the condition being that the guilty party should henceforth behave properly. He is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached where the guilty party has, by his good behaviour, proved himself worthy of the trust and confidence

---

(207) Tilley v. Tilley, (1949) P. 240; D. Tolstoy, Law and Practice of Divorce and Matrimonial Cases, 64; Raydens, Practice and Law in the Divorce Division, 182

(208) Raydens, Practice and Law in the Divorce Division, 181

(209) Blandford v. Blandford, (1883) P.18. (1940) P.8.

(210) (1950) P. 16.

of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, until the time may come when the proper inference is that the forgiveness is no longer conditional, but has become absolute. Accordingly, in Beale v. Beale (211) where a husband and wife cross-petitioned for divorce, on the ground of cruelty, on the assumption that certain episodes which took place some fifteen years earlier amounted to cruelty, since the spouses had lived together a normal married life, without untoward incidents, from January, 1938, to Demember, 1945, the episodes which occurred before January, 1938, were regarded as forgiven by both spouses absolutely, and they could not be revived by any events occurring after December, 1945.

The only exception to this doctrine of revival of a condoned offence by a subsequent offence occurs where a covenant is entered into which precludes any subsequent revival. This is known as "express condonation" or "estoppel by deed" (212).

Burmese Buddhist Law contemplate the condonation of marital offences (213). Condonation may be by either spouse. The law on the subject is dealt with in section 416 of the Digest, Vol. II. "If the husband resume cohabitation with

---

(211) (1951) P. 48, (C.A.).
(212) D. Tolstoy, Law and Practice of Divorce and Matrimonial Cases, 65.
(213) Digest, II, sec. 416.

the wife who has committed adultery, the relationship of the husband and wife shall again be established" (Panam), "because by resuming cohabitation, he shows that he has no desire to divorce her altogether" (Pyu and Sônda). There shall be no offence if the husband resumes cohabitation with the wife whom he has divorced for misconduct" (Manuyin). In such a case, "he shall have no right to accuse her of infidelity.. They shall be deemed to have re-established their conjugal relations." This passage is quoted from Manu-Vaṇṇanâ (214). Fox, J. says, (215)

"Condonation means a full forgiveness of a known conjugal offence or an implied condition that the misconduct condoned shall not be repeated. No doubt where a husband after knowledge of an act of adultery on the part of his wife, continues to sleep in the same bed with her, there arises a strong presumption, not only that he resumed conjugal intercourse with her, but that he condoned her offence; such presumption however, is capable of being rebutted. The position of a wife, however, is very different, and condonation on the part of a wife is not to be lightly presumed from a continuance of cohabitation after a marital offence against her." At page 29 of Mr. Jardine's third note on Marriage and Divorce, he remarks that section 122 of the Manu-Vaṇṇanà seems to apply

---

(214) Section 172.
(215) Ma San Shwe v. Maung Pe Thaik, (1901) 8 B.L.R. 24.

the English doctrine of condonation. Of the four texts cited in section 416, only Manu-Vannanâ can be regarded as giving any support to the view that condonation is conditional in Burmese Buddhist Law, and the other texts seem to support the view that in Burmese Buddhist Law condonation is absolute.

In the case of Ma Pan Nyun v. Maung Aung Thet (216) Ormond, J., held that previous acts of violence cannot be held to have been condoned simply because the party has not formally complained or threatened a divorce on each occasion. In connection with cruelty as a matrimonial offence the Dhammathats (217) say that after the first offence, the wife should be urged to forgive him; if she does, he is to be bound over not to repeat the offence, on pain of being divorce and deprived of all rights in the property of the marriage. Modern commentators maintain that where a fault has been condoned, it is revived by a subsequent repetition (218), and it was held in Ma On v. Maung Aung Bwa (219) that where cruelty had been condoned, adultery subsequent to the condonation will revive the former cruelty. This decision is in accordance with English Law.

If we are going to introduce the English rule that a condoned matrimonial offence can be revived by the commission

---

(216) (1916) 10 B.L.T. 228.
(217) Dig. II, sec. 303.
(218) S.C. Lahiri, Burmese Buddhist Law, 90;
(219) U May Oung, Leading cases on Buddhist Law, 124.
(219) (1916) 10 B.L.T. 228.

of a different matrimonial offence (220), must we not also bring with it other rules of English Law? A condoned offence, in English Law is revived by doing something less than what would amount to the condoned matrimonial offence; for instance adultery may be revived by amorous play with a person of the other sex. There is no obvious reason why the Burmese Buddhist Law should have a different rules, for it can hardly be contended that condonation implies license to commit matrimonial faults other than the one condoned. Condonation must mean restoring the erring spouse to the position he or she held before the offence committed on condition that he behaves properly and abstains not only from the acts recognised as grounds for divorce but from other acts calculated to cause pain or distress to the condoning spouse.

---

(220) Richardson v. Richardson, (1950) P. 16.

CHAPTER XI.

Partition upon Divorce.

1. Maintainability of a Suit for Bare Divorce.

Owing to the fact that marriage in Burmese Buddhist Law not only confers a status but invests both parties with rights in the property of the marriage, a divorce is almost invariably followed by partition (1). Though it is now settled law that a bare suit for divorce lies under Burmese Buddhist law (2), this position has only been reached after reconciliation of a conflict of authority on the question whether a suit for bare divorce was maintainable. The Dhammathats insist that partitic of property is an essential part of the proceedings in divorce so that, if one party remarries before this is done, he or she forfeits all interests in the property of the marriage (3). In consequence of the Courts of Upper Burma held that a marriag was not dissolved until there had been a partition of property, although the Courts of Lower Burma, founding on the procedural law, held just the contrary. Both in Upper and Lower Burma the Courts took the view that, owing to the community of interest between husband and wife in the property of the marriage, divorce and the partition of property consequent thereon, involved only one cause of action. But while in Upper Burma this cause of action was held to give rise to one relief, in

---

(1) O.H.Mo◆tham,"Burmese Buddhist Law, 42.
(2) Maung Pe v. Ma Lon Ma Gale,(1911) 6.L.B.R,18(P.C.).
(3) Digest II, section 441.

Lower Burma it was held to give rise to two. In the opinion of the Judicial Commissioner of Upper Burma a suit for a 'bare divorce' would not lie, as no sufficient cause of action was disclosed (4); the Chief Court of Lower Burma held that the matter being one of procedure, must be determined by the Civil Procedure Code and that not only would a suit for a 'bare divorce' lie, but by virtue of the provisions of Order II, Rule 2, of the Code of Civil Procedure, it would be a bar to a subsequent suit for partition as the cause of action was the same (5).

The conflict was eventually set at rest in the case of Maung Pe v. Ma Lon Ma Gale (6) when the Privy Council pointed out that there were in reality two causes of action, and that the cause of action in a suit for divorce was quite different from that in a suit for partition, so that separate suits for divorce and partition could be entertained in that order. "The partition", said their lordships, "may no doubt be treate as relief consequential upon the divorce, and therefore, dealt with in the same suit, but the evidence is different, and the ground of divorce must be first and separately proved as a

---

(4) Nga Chit Nyo v. Mi Myo Tu, (1910) I U.B.R.30.
(5) Mg.Tha Chi v. Ma E Mya, (1899) I L.B.R.7;
Lon Ma Gale v. Mg.Pe, (1909) 5 L.B.R.114.
(6) (1911) 6. L.B.R.18 (P.C.).

distinct cause of action before any question of partition can properly arise". (7).

2. Points for Consideration in Partitioning Properties.

The rules of partition of property upon divorce laid down in the Dhammathats vary according to the grounds for the dissolution of marriage, and the condition of the spouses at the time of marriage.

In deciding the method of partition in each case the following points must therefore be taken into consideration namely:-

(a) Whether the divorce is by mutual consent or on account of some matrimonial fault.

(b) Whether the parties are eindaunggyis or ngelin-nge-maya.

(c) Whether the parties stand in the position of nissaya and nissita (8).

3. Eindaunggyis and Ngelin-nge-maya.

For the purpose of partition and divorce when neither the husband nor the wife has been previously married they are to be classified an ngelin-nge-maya, (young husband and wife) (9). Even if one of them was married before, they are still to be ngelin-nge-maya. If a ngelin and nge maya divorce, and soon

---

(7) Maung Pe v. Ma Lon Ma Gale, (1911) 6 L.B.R.18 at 20(P.C.).
(8) U May Oung, "Leading Cases on Buddhist Law, 107.
(9) Ma E Nyun v. Mg. Tok Pyu, (1900) II U.B.R.39.

after re-unite, they are still to be classed as ngelin-nge-maya (10). But when both husband and the wife have been married before, they are to be classed as eindaunggyis (previously married persons).

4. Partition of Property when there is a Divorce by Mutual Consent.

(1) PAYIN

Property originally in the possession of either and brought to the coverture is treated differently by the Dhammathats according as the couple are eindaunggyis or were bachelor and spinster at the date of the marriage.

As regards payin property, it was held in the case of Mi Daw Nau v. Maung Tu (11) that each party takes back the property brought to the marriage by him or her, where the divorce is by mutual consent. The report of this case does not show whether the parties were eindaunggyis or otherwise. In Ma San Shwe v. Vulliappa Chetty (12), Thirkwell White J.C., held that the weight of authority in section 254 of the Digest seems to incline to the position that each party takes his or her payin.

In Mi Myin v. Nga Twe (13) the leading Upper Burma authority, in which Shaw J.C., pointed out that various

---

(10) Mg.Ying Maung v. Ma So, (1897) II U.B.R.34; Mi Saing v. Ma Yan Gin, (1914) 2 U.B.R. 127.
(11) (1873) S.J. 14.
(12) (1903) 10 B.L.R. 49.
(13)(1906) II U.B.R., Divorce 19.

translations of the Dhammathats were incorrect. He held that, where one party has brought property to the marriage and the other has not, the relation of nissaya and nissita is established and the dependant is entitled to one-third of the payin. The learned Judicial Commissioner would make no distinction between persons who have not been married before and persons who have, but the case only decided the point as betwee a couple of the former class. The Upper Burma view was accepte by a Bench of the Chief Court of Lower Burma for couples, who had not been married before in the case of Ma Ngwe Hnit v. Maun Po Hmu, (14) and in U Mg.Nge v. P.L.S.P.Chettyar, (15).

Where both the husband and wife are eindaunggyis, they tak no interest on marriage in each other's payin, and the pre-nuptial property (payin of a previously married spouse) reverts to its owner on divorce by mutual consent (16).

The Judicial Committee in U Pe v. Maung Maung Kha, (17), a has been pointed out in U Maung Nge v. P.L.S.P.Chettyar, (18), was misled by statements at the bar into unnecessarily stating that payin is divisible in equal shares.

---

(14) (1921) II L.B.R.52.
(15) (1934) A.I.R. Ran. 200.
(16) Mg.Yin Maung v. Ma So (1897) II U.B.R.(1897-01) 34; Mi Myin v. Nga Twe, (1906) II U.B.R.B.L.Div.19; U San Yin v. Mg.Po Yin,(1940) Ran. 534 at 540.
(17) 10 Ran. 261 at 268(P.C).
(18) (1934) A.I.R. Ran. 200.

The divorce of a couple, one of whom has been married before and the other has not, is not dealt with in the Dhammathats. This question first arose for consideration in Upper Burma in the case of Ma E Nyun v. Maung Tok Pyu (19) before Thirkell White J.C., and the learned Judicial Commissioner made the following observations:-

"It would, I think, be an equitable rule and in accordance with the spirit of the law to allow the wife, in a case of this kind, somewhat more favourable terms than in the case where either party has been married before. It is certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her maidenhood. Nor is there any warrant for so doing. But, without assuming the province of the legislative, it is not possible for the Court to say what more favourable terms should be conceded to the wife in this case. It may, however, be laid down with certainty that the decision is within the law, that the rules regualting the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before". In stating that it would be "certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of her previous maidenhood", the learned Judicial

---

(19) (1900) II U.B.R. (1897-1901) 39.

Commissioner ignored the rights of the atet children of the previously married husband; the benefit of his previous marriag not to the husband but to his children by a previous marriage, whose interests in the payin of their father have to be considered.

About 20 years later, a similar question arose in Lower Burma in the case of Ma Ngwe Hnit v. Mg.Po Hmu and others (20). In this case, the husband has been previously married and was rich. The wife had not before been married and was poor. The learned Judges, Robinson C.J and Heald, J., who dealt with the case, accepted the law as laid down by Thirkwell J.C. as good law. Robinson C.J. said, "In the present case, if any other rule were adopted, it would be in the words that Sir Herbert Thirkell White used in Ma E Nyun v. Mg.Tok Pyu, (21) certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maiden-hood. It appears to me that there is considerable force in the suggestion of Sir George Shaw that the rule laid down in Manukye as regards persons both of whom had been previously married were based on the assumption that both brought property to the marriage. Further there seems to be no justification for applying a different rule where the relation of nissaya and nissita existed in the case of a woman who had not been

---

(20) (1921) II L.B.R.52.
(21) (1900) II U.B.R. (1897-1901) 39.

married before because the husband had been previously married. Under 261 of the Digest a provision is made for the case of a man who had previously married a spinster and divorcing her not long after the marriage and before there was time for any property to have been jointly acquired by them. It allows the wife compensation, and it appears to me that all those provisions point to a recognition of the necessity of making a husband, which is able to do so, provide for a wife who comes to the marriage with nothing". For the above reasons it was held that in the case where the wife is a spinster but the husband had been previously married, where the husband brings payin to the marriage and the wife nothing, the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without faults and where the relation of nissaya and nissita exists. (i.e. the wife was entitled to one-third of the payin property

Then a similar question arose indirectly for discussion in the case of C.T.P.V.Chetty Firm v. Mg.Tha Hlaing,(22). In that case Maung Gyi, J., with whom Sir Sydney Robinson C.J. agreed, accepted the law as laid down in the cases cited above as good law but Carr J. struck a discordant note.

The learned Judge said:-

"The intermediate case in which one had been married befc

---

(22) (1925) 3 Ran. 322 (F.B.).

and the other has not, is not dealt with in the Dhammathats but where the rule in the two extreme cases is the same there is no difficulty in holding that it applies also to the middle case. It is not necessary, therefore, to decide which of the two different rules is to be followed (in the case under discussion but I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in Ma E Nyun v. Maung Tok Pyu, (23), but the reasoning of Sir H. Thirkwell White in that case seems to me to be based on a misconception of the reason for the differences i the rules. This decision was followed in Ma Ngwe Hnit v. Maung Po Hmu, (24) but there were special circumstances in that case which rendered the decision at least equitable", (25).

A similar question arose in Mg.San Bwint v. Ma Than Sein (26) and because of the doubt thus thrown by Carr J. over the correctness of the decisions given in cases of Ma E Nyun and Ma Ngwe Hnit, this case was referred to a full Bench. Ba U,C.J pointed out that inspite of Carr J's doubt, the law as laid down in the above two mentioned cases is still good law and it has stood the test of time for nearly half a century in Upper

---

(23) (1900) II U.B.R. (1897-1901) 39.
(24) (1921) II L.B.R. 52.
(25) (1925) 3 Ran. 322 (F.B.) at 346.
(26) (1948) Ran. ~~L.R.~~ I (F.B.).

Burma and nearly 30 years in Lower Burma. People knew and understood it. To change it now, without having strong and compelling reasons for doing so, would be to introduce chaos and uncertainty into the family, social and commercial life of the Burmese people. He further pointed out that the learned Judges who decided the cases of Ma E Nyun and Ma Ngwe Hnit knew of the existence of the rule relating to the intermediate case in section 261 and 262 of the Digest, but the rule propounded therein was obsolete and archaic; it could not be applied in modern conditions of life. For instance, the Rajabala, one of the Dhammathats cited in states inter alia as follows:-

"A previously married man marries a spinster, and before any property is yet acquired and without any cause of complaint against her, desires to divorce her. If he is inferior (in rank) to her, he shall give her a pair of earings, because her parents gave her to him not withstanding their knowledge of his position and circumstances. If they are equal in rank, he shal give her the slaves who accompanied the marriage procession, th sedan chair, elephants, ponies, etc., used in the ceremony, and the clothes and ornaments worn at the time of the marriage. If there is no such property, he shall give her a male slave. If she is pregnant, he shall give her sufficient money to defray the expenses of her accouchment and a female slave as nurse. I they are related by blood to each other, he shall give her a male and female slave whether she is pregnant or not".

The other Dhammathats cited in section 261 lay down the law in more or less the same way. A rule such as that in Rajabala reproduced above cannot be applied today. It must be modified so as to suit modern conditions. The Judges who dealt with Ma E Nyun's, (27) and Ma Ngwe Hnit's (28) cases, endeavoured to do this, seeking the most fair and equitable method of dividing the atetpa property by applying the rule of nissaya and nissita . It was accordingly held that on divorce by mutual consent between a Burmese Buddhist couple, on of whom had been previously married and the other had not been so married, the atetpa property of the party previously married should be divided on the principle of nissaya and nissita, provided that no property had been acquired by the couple after the marriage. This raised the question what would be the rule of partition on divorce if both the spouses in similar circumstances brought payin property to the marriage? E. Maung J., said that this rule cannot and should not be extended to a divorce which is not in fact by mutual consent, but which for the purpose of partition on divorce is by a legal fiction deemed to have been as by mutual consent. This opinion, however, provoke another question, what would be the rule for partition of property on divorce for misconduct, which by a

---

(27) (1900) II U.B.R. (1897-1901) 39.
(28) (1921) II L.B.R. 52.

legal fiction is deemed to have been as by mutual consent?

The rule of nissaya and nissita does not apply in favour of a spouse who gives away his or her property just before the marriage in order that he or she may not bring payin to that marriage (29); nor does it apply to the profits during coverture of the payin of either spouse. (30).

(2) Hnapazon and Ordinary Lettetpwa.

Hnapazon property (31) and ordinary lettetpwa (32) is divisible equally between the parties.

Lettetpwa by Succession.

Lettetpwa by succession is divisible between the parties in the proportion of two to one, the party inheriting the property taking the larger share (33).

5. Partition upon divorce on the Ground of Mis-Conduct.

(1) Adultery.

Ba U J. observes, "The Dhammathats are impregnated with the teachings of Lord Buddha in places where they deal with the questions relating to the relations between a husband and wife.

---

(29) Mg.Shwe Tha v. Ma Waing, (1921) 11 L.B.R.48.
(30) Ma Dwe v. Ma Tin Lun, (1918) 12 B.L.T.228.
(31) Mi Dwe Naw v. Mg.Tu,(1873) S.J.14; Mi Myin v. Nga Twe, (1906) 11 U.B.R.B.L.Div. 19;
Daw Pu v. Mg.Tun Kha, (1946) Ran. 125.
(32) Ma Kin v. Mg.Po Sein, (1927) 6 Ran. 1;
S.P.L.S.Chettyar Firm v. Ma Pu,(1936) 14 Ran. 697;
The Official Assignee v. Ma Hnin San, (1940) Rgn. 208.
(33) Mg.Shwe Tha v. Ma Waing,(1921) 11 L.B.R.48;
Mi Myin v. Nga Twe,(1906) 11 U.B.R.B.L. Div. 19;
Kin Kin Gyi v. Mg.Kan Gyi,(1902) 11 U.B.R.(1902-3) B.L.Div.1.

One of the teachings of Lord Buddha is that the husband shall love and cherish his wife and be faithful to her and that the wife shall respect and obey her husband and be faithful to him. This teaching has been made a foundation by most of the writers of the Dhammathats on which they have built up the rules regulating the conduct between a husband and wife. Therefore, in order to enforce obedience to this teaching of Lord Buddha, the essence of which is the sacredness of a family tie, the writers of the Dhammathats have imposed forfeiture of the right to property on the spouses who is guilty of adultry". (34).

Thus, the general rule is, that the guilty wife forfeits all her property, where a divorce is on the ground of adultry (35).

In Maung Yin Mg. v. Ma So (36) the parties were man and wife from their youth, but they separated and subsequently reunited. The husband sued for a divorce from his wife on the ground of her adultry and claimed the whole of the property which belonged to his wife or to his wife and himself together. It was held that as neither of the parties had married a third party but had only reunited with each other, they must be regarded as the husband and wife of youth, and that consequentl

---

(34) S.A.S.Chettyar Firm v. U Mg.Gyi,(1936) 14 Ran. 329.
(35) Mg.Yin Maung v. Ma So, (1897) II U.B.R.(1897-1901) 34; O.H.Mootham, Burmese Buddhist Law, 45.
(36) (1897) II U.B.R. (1897-1901) 34.

the rule relating to the case of a couple married from their youth applied. The rule in S 393 of the Attasankhepa was followed. It contains this passage: "If in conswquence of the wife having committed adultry a divorce has to take place, let the price of the woman's body (kobo) and 40 ticals as the penalty for adultry be paid to the man after which the woman shall be made to pay all the debts and the man shall take all the joint property, both animate and inanimate, and the woman shall be made to leave the house with only the clothes she has on her person".

In S.A.S.Chettyar Firm v. U Maung Gyi and another (37) it was held that the guilty wife forfeits her right only in the hnapazon property. It is submitted that this rule is inconsistent with the penultimate clause of section 43 of Book XII of the Manugye which inter alia reads: "For this reason, let him take all the property, and have a right to put away".

In Ma Dun Mai v. Maung San Tun (38), Dunkley J., appears to have been of the opinion that the property subject to forfeiture is limited to the joint property of the marriage, but this appears to have been obiter.

The same mutatis mutandis, would apply in the case of a husband whom the wife was entitled to divorce for misconduct(39

---

(37) (1936) 14 Ran. 329.
(38) (1938) Ran. 229.
(39) Mg.Yin Mg. v. Ma Soe,(1897) II U.B.R.(1897-1901) 34; U Tha Gywe, A treatise on Buddhist Law,Vol.I. 180-1.

The rule is the same whether the parties are ngelin-ngemaya or eindaunggyis (40).

But there is an execption to the above general rule where both husband and wife are eindaunggyis, with regard to payin property. The eindaunggyi wife is entitled to retain her payin property notwithstanding the fact that she is guilty of adultery (41). Mr Burgess, J.C., said (42): "It seems to me that the reason for making a distinction is plain enough and it is this: When a woman has been married before, the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered into a subsequent union which has to be dissolved. Although she may be in fault, there are other besides herself to be considered, and it would be unjust and cruel to make them suffer for her misconduct. On the other hand, when the woman has been only once married there is nobody to be considered but herself and the children; it is probably immaterial so far as they are concerned, to which parent the property goes, as they would eventually inherit from one or the other". It is also stated in the Digest (43) as follows:-

"If the divorce is in consequence of the wife's adultery,

---

(40) S.A.S.Chettyar Firm v. U Maung Gyi and another, (1936) 14 Ran.329.
(41) Mg.Yin Maung v.Ma So,(1897) II U.B.R.(1897-1901) 34; S.A.S.Chettyar Firm v. U Maung Gyi(1936) 14 Ran. 329.
(42) Mg.Yin Maung v. Ma So,(1897) II U.B.R.(1897-01) 34 at 35.
(43) Digest II, section 259.

let the (payin) property originally brought to the marriage be taken by the party who brought it, and let the husband take the jointly acquired property together with the thinthi property obtained from the King, and let the wife pay all the debts contracted by both.

It may, therefore, be said that where a divorce is adjudged for adultry on the part of the wife, the husband is entitled to the whole of the joint property as also his atetpa or payin property, (as in eindaunggyi couples), and in some cases to wife's payin also (as in ngelin-ngemaya couples).

In Ma Dun Mai v. Maung San Tun (44), Dunkley J., held that, on the death of a husband, his heirs cannot claim partition of the estate as against the widow on the basis of her adultry, and that the penalty for adultry can be enforced only by the husband inasmuch as divorce is essentially a personal action.

The husband cannot retain the property on his own allegation of his wife's guilt. He must bring a suit for divorce and prove the guilt in a Court of Law (45).

(II) Cruelty.

In the reported cases in which the Court has had to partition the property of husband and wife consequent upon a divorce on the ground of cruelty, the rule of division has been

---

(44) (1938) Ran. 229.
(45) U Sin v. Ma Ma Lay, (1941) Ran. 14.

that applicable in the case of a divorce by mutual consent (46).

The division w-as made in this manner either because it was so asked for by the petitioner (47), or because the Court held that the misconduct which had been established was only such as would entitle the petitioner to a divorce 'as by mutual consent (48). There is evidence in the Dhammathats of a more rigorous rule where under a husband whose cruelty has occasioned the dissolution of his marriage would forfeit the whole of his property (49), but this rule has not yet been judicially considered (50).

It was said in Daw Pu v. Maung Tun Kha (51) that where a spouse is 'guilty of cruelty once' the other party is entitled to divorce. In such case partition of properties of marriage will be as in case of divorce by mutual consent, i.e. half shar in the jointly acquired properties and one-third share in other spouses payin or inherited lettetpwa (52).

---

(46) Ma E Nyun v. Mg.Tok Pyu(1900) II U.B.R.(1897-1901) 39; Kin Kin Giyi v. Mg.Kan Gyi,(1902) II U.B.R. (1902-3) Buddhist Law,Divorce 1; Mi Myin v. Nga Twe (1906), II U.B.R. (1904-06) Buddhist Law,Divorce 19; Mi Saing v.Nga Yan Gin,(1914) 2 U.B.R.127.
(47) As in Kin Kin Gyi's case and in Mi Saing's case (supra).
(48) As it seems in Ma E Nyun's case and in Mi Saing's case(supra
(49) See Kin Kin Gyi v. Mg.Kan Gyi,(1902) II U.B.R.(1902-3) Buddhist Law Divorce 1.
(50) O.H.Mootham, Burmese Buddhist Law, 46.
(51) (1946) Ran. ~~L.R.~~ 125.
(52) This decision was followed in:- Po Han v. Ma Talok,(1913) 7 L.B.R.79; Ma Sat v. Mg.Nyi Bu, (1921) 4 U.B.R.68; Ma Gyan v. Mg. Su Wa, (1897-1901) 2 U.B.R.28.

But where cruelty is aggravated by the fact that instead o being repentant, the guilty party is desirous of divorce or by the fact that it is committed with intent to make the other party seek a divorce, or by other facts such as frequent repetition of acts of cruelty or grevious hurt within the meaning of section 320 of Penal Code, the party guilty of such cruelty will be deprived of his or her share of the joint property on divorce (53).

(III) Desertion.

The rule of partition on the dissolution of marriage on ground of desertion is still obscure. It can, however, be said with certainty that, contrary to the view formerly held, a wife who deserts her husband does not thereby forfeit her entire interest in the property of the marriage (54).

The Chief Court of Lower Burma in Ma Thet v. Ma San On (55) had held that, where divorce had been brought about by the wife' desertion, she lost all claim to the joint estate, and the High Court subsequently applied a similar rule in the case where the desertion was by the husband and extended it to forfeiture of the former's entire interest in the property of the marriage(56)

---

(53) Daw Pu ~~(a) Daw Pu Gyi~~ v. Mg.Tun Kha (1946) Rgn.~~L.~~R. 125.
(54) U Pe v. U Maung Maung Kha,(1932) 10 Rgn.261 (P.C.).
(55) (1903) 2 L.B.R. 85.
(56) Mg.Po Nyun v. Ma Saw Tin, (1925) 3 Ran.160;
Ma Kin v. Mg. Po Sein (1927) 6 Ran.1.

In U Pe v. U Maung Maung Kha (57), their Lordhsips of the Privy Council held that a wife by merely deserting her husband does not commit a fault causing her to forfeit her interest in such property.

In Maung Po Nyun v. Ma Saw Tin (58), their Lordships of the Privy Council refused to accept the general proposition that a husband who deserted his wife forfeited his whole interest in the property of the marriage. Sir Lancelot Sanderson who delivered the judgement of the Board said inter-alia: "As already mentioned, the Dhammathats do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property... If it had been the law that the husband would forfeit all his interest in the property, joint or separate, if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the Dhammathats a statement of the law to that effect". The Board, however, confirmed the decree of the Rangoon High Court giving the deserted wife a one-third share in what appears to be lettetpwa of the marriage on grounds of equity, justice and good consience".

In Ma Dun Mai v. Maung San Tun (59), Dunkley J., held that

---

(57) (1932) 10 Rgn. 261 (P.C.).
(58) (1927) 5 Rgn. 841. (P.C.).
(59) (1938) Rgn. 229.

a wife who is guilty of desertion does not incur the penalty of forfeiture of the property of the marriage and that the partition in such a case must be made in accordance with justice equity and good conscience. His Lordship then divided the hnapazon property in equal shares between the deserting wife and the sole heir of her deceased husband as if there had been a divorce by mutual consent. It would appear, therefore, that:-

(1) desertion, whether by the husband or the wife will not ipso facto entail forfeiture of the guilty party's entire interest in the property of the marriage.

(2) partition on divorce on the ground of desertion will be in accordance with justice, equity and good conscience. The rule of partition - which in such circumstances is prima facie applicable is, it is submitted, that governing partition upon a divorce by mutual consent.

(3) consideration in each case must be given to the particular facts before the Court, such as the circumstances in which the marriage was contracted, the nature of the desertion and the like (60).

If a seperation ensues owing to the husband's desertion he he has three years from the date of desertion to sue for a divorce and may prove the factum of adultery; if the wife has deserted her husband he has but one year to sue. After the

---

(60) Mg Po Nyun v. Ma Saw Tin, (1927)5 Ran.841 at 861 (P.C.).

lapse of the period which dissolves the marriage tie the husband can no longer aver and prove adultery to support a claim to the entire property of the marriage in any suit brought by him. To hold otherwise would be to permit the disputed question of the wife's adultery to be examined into many years (61) after the marriage had been dissolved. Thus, where a marriage has been dissolved as a consequence of a wife deserting her husband, the property of the marriage will be partitioned on that basis; and the fact that the wife may also have committed adultery is immaterial (62).

6. Partition when there are two Wives.

The Dhammathats do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status. It is, therefore, necessary to apply to such a case, the principles of justice, equity and good conscience, having regard, also, to the general rules of Burmese Buddhist Law so far as these rules can be applied (63). If a Burmese Buddhist having a wife already, takes a second wife, the respective shares of the parties, on divorce by mutual consent, in the various properties seem to be as follows:-

(1) In property, brought by the husband to the first marriage, the husband takes four-ninths, the first wife three-ninths, and

---

(61) U Sin v. Ma Ma Lay, (1941) Rgn. L.R.14.
(62) U Sin v. Ma Ma Lay, (1941) Rgn. L.R.14;
Ma Dun Mai v. Mg.San Tun, (1938) Rang.229.
(63) Mg.Po Nyun v. Ma Saw Tin, (1925) 3 Ran.160.

the second wife two-ninths.

(3) in the jointly acquired property of the first marriage, the husband takes two-sixths, the first wife three-sixths and the second wife one-sixth (64).

(4) in the property inherited by the husband after the second marriage, the husband takes two-thirds and the wives one-sixth each (65), (as the husband would be the nissaya and the wives would be nissita).

(5) in the jointly acquired property of the second marriage, the husband takes one-half and the wives one-quarter each (66).

On the question of the interests of the husband and the wives in the joint property there is a conflict between Po Nyun's case (67) and the Full Bench decision in C.T.P.V.Chetty Firm v. Maung Tha Hlaing (68). This was decided a few weeks after Po Nyun's case, but as it was not brought to the notice of the Full Bench, it was not considered. The conflict between the two cases is that in Po Nyun's case (69), the Bench gave each wife individually a share as if she had been the sole wife Thus, in the case of property acquired during each marriage, the application of this principle would give a one-third interest

---

(64) Mg.Po Nyun v. Ma Saw Tin, (1925) 3 Ran. 160.
(65) C.T.P.V.Chetty Firm v. Mg.Tha Hlaing,(1925)3 Ran.322(F.B.)
(66) Ma Kin v. Mg.Po Sein,(1927) 6 Ran.1;
S.P.L.S.Chettyar Firm v. Ma Pu,(1936) 14 Ran.697.
(67) Mg.Po Nyun v. Ma Saw Tin, (1925) 3 Ran. 160.
(68) (1925) 3 Ran. 322. (F.B.).
(69) (1925) 3 Ran. 160.

each to the husband and the two wives. In C.T.P.V.Chetty Firm's case (70), the Full Bench adopted a different principle, giving the two wives collectively the share that a sole wife would have had. On this basis the husband's interest would be one-half and that of each of the two wives one-quarter. The question, therefore, in Ma Kin v. Maung Po Sein, (71), was which of the two methods is the more equitable. As the Full Bench decision in C.T.P.V.Chetty's case (supra) was binding on the Bench, and as the Bench was of opinion that the principle adopted was not wrong, the Full Bench decision was followed in Ma Kin v. Mg.Po Sein (72). In S.P.L.S.Chettyar Firm v. Ma Pu (73), Dunkley J., followed the Full Bench decision is C.T.P.V.Chettyar's case and held that in ordinary lettetpwa of a second marriage, the husband takes one-half and the wives take one-quarter each.

Upon a divorce by mutual consent, the parties should discharge their joint-debts in proportion to their respective shares in the property of marriage (74). Where the divorce is due to a fault, all joint debts must be paid by the culprit (75

7. Partition how affected.

A valid partition of properties can be effected orally

---

(70) (1925) 3 Ran. 322 (F.B.).
(71) (1927) 6 Ran. 1.
(72) (1927) 6 Ran. 1.
(73) (1936) 14 Ran. 697.
(74) Manugye, Book XII, section 3.
(75) U May Oung, "Leading cases on Buddhist Law", 87.

(76), but if a deed of partition be drawn up at all, it must be duly stamped and, where it concerns immovable property worth Kyats 100 or upwards, it must also be registered (77).

When partition is sought on the divorce of a polygamous husband from one of his wives, it is necessary to establish that the particular wife is of superior status. The interests of the wife and the husband in the property of the marriage determine the share on a divorce by mutual consent and also where though not by consent, the partition is on the basis of a divorce by mutual consent. (78). Forfeiture enforced against the wife does not present any difficulty, her interests going to swell the husband's share (79); but where the hsuband's fault justify forfeiture, it has been held in Ma Kin v. Maung Po Sein (80) that justice to the other wife requires that her contingent interest in the husband's share should be left intact and that the wife divorcing the husband should not obtain more than she would obtain on the death of the husband.

---

(76) P.K.A.C.T.Chokalingham Chetty v. Mg.Yaung Ni,(1912)6 L.B.R.170;
Mg.Hmwe v. Ma Lun Aung,4 (1910)4B.L.T. 186;
Ma Sein Nyun v. Mg.U,(1914) 25 I.C. 488;
Mg.Po Lun v. Ma E Mai,1 (1922)1B.L.J.III;
Mg.Po Kin v. Mg.Shwe Bya,(1923) 1 Ran.405.
(77) Mg.Shwe Bwin v. Ma Son,(1892) S.J.655.
Mulla's Registration Act 37.
(78) U E Maung, "Burmese Buddhist Law, 108".
(79) U E Maung, Burmese Buddhist Law,108.
(80) (1927) 6 Ran. 1.

(8) Effect of Divorce on Children.

(1) Custody of the children on Divorce.

The rule governing custody of children upon divorce by mutual consent is contained in sections 254 and 257 of the Kinwun Mingyi's Digest, Volume II and section 3 of Book XII of Manugye. In the days, when the texts referred to were written, the children were regarded more or less as chattels and the Dhammathats recognised the absolute right of the parents to sell or dispose of them. But the sentiments of modern Burmese Buddhists are entirely different; slavery has been abolished and children can no longer be sold to others. Nevertheless, the ancient rule that upon divorce, the children of the marriage are bound by the arrangements made by their parents, who have an unfettered discretion to decide with which of them the children shall live still holds good(81). The general rule is that the mother takes the girl children and the father the boys, but the matter is purely one of arrangement at the time of the divorce(82).

Hartnoll, J., said(83), "As has been pointed out in various cases, parents have a right of control over their children, and in the case of a divorce a position very analogous to that of adoption arises. In adoption parents give away their children to others and unless filial relations are resumed the children so given away lose all rights of inheritance from their natural

---

(81) Ma Tin U v. Ma Ma Than, (1927) 5 Ran.359
(82) Ma Chit May v. Ma Saw Shin, (1934) 13 Ran.166;
Mg.Ba Thwin v. Mg.Po Hti, (1928) 6 Ran.510;
Ma Tin U v. Ma Ma Than, (1927) 5 Ran.359.
(83) Ma Yi v. Ma Gale, (1912) 6 L.B.R.167 at 169.

parents. In the case of young children their wishes are not consulted. It is the will of the natural parents and those who adopt them which decides the matter. Similarly in a case of divorce when the children are of tender years it is the will of the parents which decides the disposition of the children, and I think that it must be held similarly that the children lose the right to inherit the property of the parent who has not adopted them unless filial relations are resumed."

(2) The Child of a divorced wife must maintain filial Relations to Inherit Father's Estate.

The children while minors are bound by the choice of their parents in respect of their custody, but if they are brought up by the mother, as is usually the case, they can rejoin the father's family when they attain years of discretion(84). At the time of divorce and partition of property it is the will of the parents which decides which child shall inherit from whom in future(85). But after the divorce, on the attainment of the age of discretion, it is the conduct of the child which determine whether it shall inherit the estate of the parent it has not followed(86).

The general principle of Burmese Buddhist Law is that upon divorce, the family is split into two branches and the child who belongs to one branch does not inherit from the other. Hence, a child that follows the father does not inherit from it's mother

(84) Mi San Mra Rhi v. Mi Than Da U, (1902)1 L.B.R.161(167).
(85) Ma Yi v. Ma Gale, (1912)6 L.B.R.167.
(86) Mg. Ba Kyu v. Ma Zan Byu, (1896) P.J.299.

unless it has maintained filial relationship with the latter(87).

When a couple divorce, their relationship to each other ceases, but their children are not thereby deprived of their right to inherit the estate of their parents. A child who follows one divorced parent is not entirely excluded from inheriting to the estate of the other parent (88). No doubt in Mi San Mra's case (89) it was ruled that children of separated parents are included among those children who cannot inherit. But that decision was based on a wrong translation. Dr. Richardson translated the passage at the end of Book X of Manugye as, "these six children shall not inherit for reasons already laid down, also children for whom fine or compensation has been paid, and children of parents who have separated." But the passage really means "reference has already been made to the children for whom fine or compensation has been paid and also to children who have separated;" as a matter of fact the children of divorced parents are not included among the children not entitled to inherit in Manugye (90).

The child of a divorced couple loses all claims to inherit the estate of the parent deserted by him or her just as an adopted child loses all claims to its natural parents' estate. As an adopted child, by abandoning the adoptive family, may

(87) Mi Thaik v. Ma Tu, (1883) S.J.184;
Ma Tin U v. Ma Ma Than, (1927) 5 Ran.359.
(88) S.C.Lahiri, Burmese Buddhist Law, 104;
U Tha Gywe, Conflict of Authority, volume 11,119.
(89) (1902) 1.L.B.R.161.
(90) U Tha Gywe, Conflict of Authority, volume 11,119.
see also Ma Tin U v. Ma Than, (1927) 5 Ran.359.

Ma

re-enter the natural family and become a member of the same provided he is acknowledged as a child by the natural parents, so a child of divorced couple may inherit the estate of the parent it had not followed by reviving filial relations with such parent. Although under Buddhist Law a child of a divorced couple is entitled to inherit, yet it is a settled rule that the child inherits from the parent with whom he or she lives, and not from the other parent who has married again and has children of the second marriage, unless filial relations are established(91). Where a child by agreement or acquiescence of the parents at the time of their divorce is alloted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other; and where that child sets up a subsequent claim to the estate of the parent who abandoned the child to the care of the other at the time of divorce, the child must prove that filial relations have been resumed(92).

The mere fact that the child followed one parent after divorce and partition does not debar him or her from inheriting the estate of the other parent.(93) The mere fact that a child did not live with either of her parents after their divorce would not disentitle him or her from inheriting to the father in a case where the child lived with the maternal grandmother,

(91) Ma Paw v. Ma Mon, (1908)4 L.B.R.272.
(92) Mg.Ba Thwin v. Mg.Po Hti, (1928)6 Ran.510.
(93) Mg.Ba Kyu v. Ma Zan Byu, (1896)P.J.299.

occasionally visited the father, received small presents from him, and was desirous of living with him(94). After divorce between parents when a child follows one parent, he or she is not entitled to inherit the estate of the other parent with whom he or she has not received or continued filial relations(95).

As pointed out by U Tha Gywe, a divorce of the parents does not per se extinguish the rights of inheritance of their children. It is a question of continuance or discontinuance of filial relations after the divorce which is the deciding factor in all such cases(96).

The general rule which allows the child of a divorced couple to inherit only from the parent with whom he or she lives and not from the other is not confined to cases where one or other of the parents remarries and has children by the new spouse, but applies with equal force to a case where the father without remarrying lives the rest of his life with a child by an earlier marriage (97).

The fact that a person was a mere child when his father died and consequently had no opportunity of exercising any option of renewing filial relationship with him is no reason for

---

(94) Ma Tin U v. Ma Ma Than, (1927)5 Ran.359.
(95) Mi Thaik v. Mi Tu,(1883) S.J.184;
Ma Shwe Ge v. Nga Lan,(1884)S.J.296;
Ma Pon v. Mg.Po Chen,(1897)1 U.B.R.(1897-1901)116;
Mi San Mra Rhi v. Mi Than Da U,(1902)1 L.B.R.(1910-13)161;
Ma Yi v. Ma Gale,(1912)6 L.B.R.167;
Mi Saw Myin v. Mi Shwe Thin,(1912)1 U.B.R.(1910-13)125:
Mi Ah Pu Ma v. Mi Hnin Zi(1913) 7 B.L.T.83;
Ma Tok v. Ma Chit, (1917)3 U.B.R.23.
(96) U Tha Gywe, Conflict of Authority, 125.
(97) Ma Hla Kin v. Mg.Chit Po,(1909) 3 B.L.T.110.

departing from the general rule that the child of a divorced couple inherits the property of the parent it follows (98). The rule excluding the child of a divorced wife who has lived with his mother and has not maintained filial relations with his father, does not extend to the case where the child was born after the divorce, and the father left no other wife or lineal descendant but lived with his co-heir; in such a case the child is entitled to one half of the property(99).

(3) What is meant by Renewal or Continuance of Filial Relationship.

Resumption of filial relations means the taking back of the child into the family of the parent with whom he or she ceased to live, after the divorce, coupled with the intention that the child shall be one of the heirs of such parent. The decisive factor is the intention of the parent, and acts of the child, such as visiting the parent, are only of assistance in deciding whether filial relations have been assumed to the extent to which they throw light on the intention of the parent (100).

Thus, mere living next-door to the separated parents' house(101), mere visiting of the separated parent by a child who lived not far from such parents' house(102), receiving maintenanc

(98) Ma E Me v. Mg.Po Mya, (1905)11 B.L.R.316.
(99) Mi Nyo v. Mi Nyein Tha, (1906)11 U.B.R.(1904-6) Buddhist Law, Inheritance.15.
(100) O.H.Mootham, Burmese Buddhist Law,9.
see also Ma Sein Nyo v. Ma Kywe,(1893)11 U.B.R.(1892-6)159; Ma Chit May v. Ma Saw Shin,(1934)13 Ran.166.
(101) Ma Pon v. Mg.Po Chan,(1899)11 U.B.R.(1897-1901)116.
(102) Ma Sein Nyo v. Ma Kywe,(1893)11 U.B.R.(1892-6)159.

money and cost of education from the separated parent(103), occasionally visiting the separated parent and offering him fruits and eatables but never spending a night in such parents' house(104), paying visits to a separated parent and receiving presents from him(105), visiting the separated parent who lived next-door and often sleeping with him or making tea for him or lighting his cigars or performing such other light work(106), are not considered sufficient to establish continuance or renewal of filial relations. The mere fact that a child is on affectionate terms with his father is not sufficient to establish the contention that the family tie giving it a continued right of inheritance in the father's estate was kept unbroken after the divorce of the mother(107). To maintain filial relations something more than what has been mentioned above is required.

Burgess, J.C., said(108), "The mere visiting of her father by the plaintiff would not be enough to establish the continuance of the filial relations of an heir. There would be no reason why all natural affection should be extinguished between parent and child because there had been a separation of the parents, but that is a different matter from the maintenance of the family bond constituting the title to inherit.....

(103) Mi San Mra Rhi v. Mi Than Da U, (1902)1 L.B.R.161
(104) Mi Ah Pu Ma v. Mi Hnin Zi, (1913) 7 B.L.T.83.
(105) Ma Tok v. Ma Chit, (1917)3 U.B.R.23.
(106) Ma Hla Kin v. Mg.Chit Po, (1909)3 B.L.T.100
(107) Ma Hla Kin v. Mg.Chit Po, (1909)3 B.L.T.100
(108) in Ma Sein Nyo v. Ma Kywe, (1893),11 U.B.R.159; also quoted in Ma Chit May v. Ma Saw Shin, (1934)13 Ran.166

Now, it appears to be clearly a principle of Buddhist Law that the child who is to inherit must aid and cherish the parent, and live with him or under such circumstances as to show that filial duty is discharged according to his wishes and that the family tie is kept unbroken. In a country where testamentary rights have not been generally recognized and where the same man or woman frequently forms or dissolves more than one matrimonial union, it is a necessary consequence that the continuance of the family relation intended to give a right of inheritance should be manifested by outward and visible symptoms sufficient to leave no reasonable doubt of the true position of affairs". The child should prove that although he or she lived separately yet he or she was a member of the separated parents' family(109).

(4) Custody of children on Partition after Divorce.

At the time of the divorce and partition of property the couple usually settle everything about the custody of their children. Where husband and wife divorce by mutual consent the husband usually takes the custody of the sons and the wife that of the daughters, though very young sons are left in the custody of their mother until they are sufficiently grown up to manage without a mother's care. This practise is approved by the Dhammathats(110). But the parties by mutual consent may arrange the matter in any way they please. Where a divorce is

(109) S.C.Lahiri, Burmese Buddhist Law, 108.
(110) Digest 11, sections 254 & 257.

adjudged for the fault of one party, the Dhammathats do not say in clear terms who should have the custody of the children, but say that the guilty spouse should leave the house and the innocent spouse should have all the animate and inanimate properties of the couple. In such a case, it would be to the interest of the children to remain with the innocent spouse who gets all the properties. Hence it seems that the faultless parent ought to get the custody of the children(111). But if the children are sufficiently grown up to form an intelligent preference their choice ought not to be easily disregarded(112).

In C.T.V.E.Vyravan Chettyar v. Ma Saw Mwe(113), it was observed by Cunliff, J., that guardianship is not specified in section 13 of the Burma Laws Act (XIII of 1898) as one of the matters to which the Burmese Buddhist Law applies. The Act only mentions succession, inheritance, marriage, caste, religious usage and institution. It was held that the Guardians and Wards Act, 1890 applies to guardianship.

But the power to appoint a guardian under the Guardians and Wards Act of a minor who is not a European British subject only extends to the appointment valid by the law to which he is subject(114).

(111) U May Oung, Leading cases on Buddhist Law,112; S.C.Lahiri, Burmese Buddhist Law, 102.
(112) Po Cho v. Ma Nyein Myat, (1909)5 L.B.R.133.
(113) (1934) 12 Ran.47 at 49.
(114) Section 6: In the case of a minor (who is not an European British subject) nothing in the Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both which is valid by the law to which the minor is subject. Savedthe power conferred by the personal law of a minor to appoint a guardian in case where the minor was other than a European British subject.

Section 25 of the Guardians and Wards Act (No.8 of 1890) (115) and sections 491 and 552(116) of the Code of Criminal procedure (dealing with proceedings in the nature of Habeas Corpus (No.5 of 1898) may be invoked for the purpose of recovery of the custody of a minor child.

The intent and purpose of section 25 of the Guardians and Wards Act, 1890 is to declare the right of the guardian of a minor to the continuous custody of his person and to provide

---

(115) Section 25 of the Guardian and Wards Act:- (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal procedure. (3) The residence of a ward against the will of the guardian with a person who is not his guardian does not of itself terminate the guardianship.

(116) Section 491(1) of the Code of Criminal procedure:- The High Court, may, whenever it thinks fit direct (b) that a person or private custody will such limits be set at liberty.
Section 552 of the Code of Criminal procedure:- Upon complaint made to a District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge of such child, and may compel compliance with such order, using for such force as may be necessary.

a machinery for enforcing it(117). This section provides a convenient, speedy, cheap and summary method to enable a guardian to get at the custody of his ward;
(1) if the ward either leaves or is removed from his custody;
(2) if such return to the guardian is for the welfare of the minor. If these two conditions are satisfied the Court will hand over the child to the guardian even against its wish by arresting it and delivering it to the guardian(118). A guardian who applies under this section is not ipso facto entitled to relief. The Court, on enquiry must be satisfied that it is for the welfare of the minor to hand over the custody to the applicant(119). When dealing with cases under this section the fundamental consideration for the Court is what is for the interest or welfare of the minor whether it relates to the education(120), or religion(121), or trade or calling(122), or the need for care and nursing owing to tender age(123), or welfare, health and happiness of the minor(124), or the previous

(117) Per Napier J., in Ibrahim v. Ibrahim, (1915) 39, Mad.608.
(118) Mantha Ramamurthi, The Guardians and Wards Act 1890, 171.
(119) Venkayyamma v. Surrayya, (1936) Mad.556.
(120) Mrs Annie Besant v. Narayaniah, (1914) 38 Mad.807.
(121) Mokoondlal Singh v. Nobadip Chunder Singh, (1898) 25 Cal.811;
Dr.Albreckt v. Bathe Jellamme, (1911) 22 M.L.J.247;
Budhan v. Bahadur Khan, (1942) Pesh.41;
Nadir Mirza v. Munni Begam, (1930) Oudh.471.
(122) Mst.Mukabar v. Karin Bakhsh (1923) Lah.283.
(123) Balche Chetti v. Ponnuswamy Chetti, (1911) 22 M.L.J.68.
(124) Md.Siddiq v. Wafati, (1948) Oudh 51;
Mt.Mehraj Begam v. Yar Md., (1932) Lah.493.

associations or attachments developed by the minor(125) or the morals (126) or other considerations relating to the minor(127). The Court must also look to the circumstances of each case and the relationship between the guardian and the ward when the application is made(128).

Another remedy open to a guardian to recover the custody of his ward is to proceed by a writ of habeas corpus under section 491 of the Code of Criminal Procedure, 1898. In the very nature of things the power given to the High Court may by section 491 only be exercised in matters of urgency, where, for instance, the guardian is suddenly deprived of the custody of his ward and there is danger to the life of the ward in the transferred custody. It should be exercised by the Court with caution and not in a case where there is merely a dispute as to who should be guardian of a particular minor(129). The remedy is not available unless it is shown that the detention of the minor is illegal or improper(130).

A person seeking really to exercise his legal right as guardian of his minor wife should be referred to his remedy under section 25 of the Guardian and Wards Act, 1890 where

---

(125) Re Gulbai v. Lelbai, (1907) Bom.50.
(126) Mt.Kundan Begam v. Mt.Arsha Begam,(1938)All.963.
(127) Jeban Krishna v. Sailendra Nath,(1946) Call.272; Nadir Mirza v. Munni Began,(1930) Oudh 471.
(128) Atchayya v. Kosaraju Narahari,(1929) Mad.81 at 82.
(129) Sultan Singh v. Maya,(1930) 52 All.491; Mt.Haidari Begum v. Jawad Ali,(1935) All.55.
(130) Subbarathnamnal v. Seshachalam,(1931) 54 Mad.759

consideration of the welfare of the minor can be taken into consideration. Though the remedy under section 491 is available to any legal guardian who claims custody of a ward, there must be satisfactory evidence that the ward is in illegal or improper custody of such a kind as to justify an emergency order by a Criminal Court under that section (131). Where a Court of competent jurisdiction declared one of two claimants to be the fit and proper person to exercise guardianship over a minor, it was held that the other could not utilise the procedure by way of habeas corpus and demand the custody of the minor from him for the purpose of going behind that order (132).

An action may be taken under certain emergency powers possessed by the District Magistrate under section 522 of the Code of Criminal Procedure, 1898, to compel restoration of abducted female minors. The Magistrate is empowered to act under that section only when the detention and the purpose of it are both unlawful. Thus where a Hindu girl, under the age of fourteen years, was detained by the lady superintendent of a Zanana Mission against the will of her guardian, admittedly for the purpose that the girl should become a Christian, it was held that the purpose was not unlawful, as, firstly, it was impossible to construe the section so as to make it include

---

(131) Sampak v. Govindammal, (1952) Mad.468.
(132) Subbarathnammal v. Seshachalam, (1931) 54 Mad.759

a purpose which, although not unlawful in the case of an adult, might only become so when entertained towards a child, and, secondly, the section applied only as it did to women and female children, contemplated a purpose which had some special reference to the sex of the person against whom it was entertained. All the same the High Court did not feel justified in ordering that the girl should be restored to the lady superintendent from whom she had been taken under the orders of the District Magistrate (133).

---

(133) Abraham v. Mahatab, (1889) 16 Cal.487.

CHAPTER XII.

INHERITANCE I.

General Principles of Devolution of Intestacy.

1. The Principle of Intestacy.

There are three fundamental principles that underlie the rules regulating the devolution of the property of a deceased Burmese Buddhists. The first is the principle of intestacy: a Burmese Buddhist has no power to make a Will. The second is commonly referred to as the principle of the non-ascent, and the third as the principle that the nearer heir excludes the more remote (1).

It has been consistently held in the Courts of Burma that under Burmese Buddhist Law, there exists only one form of succession, that of intestate succession. 'Succession' has been defined as 'the power or right of coming to the inheritance of ancestors', and involves the passing of the rights and liabilities of a deceased person to his or her heirs (2). Major Sparks in his code made no mention of testate succession.

As far back as 1873, it was postulated (3) that the right to share in ancestral estate is not affected by any instructions or Will on the part of a co-heir. In Nga San Yun's case the Deputy Commissioner of Henzada referred the question whether testamentary power is recognised in the Buddhist Law, and the

---

(1) O.H.Mootham, Burmese Buddhist Law, 69.
(2) U May Oung, Leading cases on Buddhist Law, 207.
(3) La U v. Mi Saung Ma, (1873) S.J.12.

Judicial Commissioner of Lower Burma expressed the view that the notion of a testamantary instrument to take effect after death upon property not actually passing into possession of the legatee was foreign to Buddhist Law, and no Will can effectively dispose of property contrary to the law of inheritance (4).

In Ma Bwin v. Ma Yin (5) it was held, that ownership of property involves the right to dispose of it during the owner's lifetime; with death ownership as well as the power of disposition determines; the power of making a testamentary disposition of property is not a natural right possessed by owners of property but is a creation of the Legislature and if the law does not confer that right on owners of property they cannot exercise it; there was no evidence of such long established usage as would justify the conclusion that the power of testamentary alienation had become part of the law of Burma. In the absence also of any provision in the Dhammathats allowing testamantary disposition it followed, therefore, that a Burmese Buddhist has not in law power to make a Will.

'When the law declares who shall be a man's heirs and in what order they are to inherit, the power of alienation during his lifetime cannot enable the owner of property to defeat the legal claims of his heirs by testamentary disposition. While

---

(4) Nga San Yun v. Nga Myat Thin, (1875) S.J.46.
(5) (1880) S.J. 95.

the heir has an indisputable legal title the claimant under the will has nothing to rely upon but an inchoate gift, or rather a promise to give upon the happening of a certain event which event has not only rendered the giving impossible by the death of the intended donor but has also transferred to the heir the property proposed to be given' (6).

The annexation of Upper Burma made available to the Courts of Upper Burma sources of information about the law in force in metropolitan Burma which could not have been brought to the notice of the Courts which decided the above mentioned case. In 1887, in Maung Me's case (7) there occured the opportunity to reconsider the question of testamentary power, For this power the Court collected information and expressions of opinion from a very large number of European and Burmese gentlemen, official and non-official, in the Upper and Lower province, including members of the Hlutdaw of ex King Thebaw. In the event, it was again held that the notion of a Will, as understood in English Law, was unknown to the Burmese. The Enquiry elicited that there was in use a kind of disposition called thedansa, though the word occurs nowhere in the Dhammathats. But the nature of the instrument described as a Thedansa and its purpose and effect are entirely different from those of a Will.

---

(6) Ma Bwin v. Ma Yin, (1880) S.J. 95 at 98.
(7) Maung Me v. Sit Kin Nga, (1887) S.J.429.

A thedansa is appropriate to the situations when parents, conscious of the approach of death, call their heirs together and make a formal division, orally or in writing, of their property amongst the heirs and exhort them to accept the allocation without dispute. Hence, the decision in Ma Bwin v. Ma Yin (8) was affirmed, and was followed in later cases (9).

It appears that the texts from the Dhammathats collected at sections 78 and 399 of Kinwun Mingyi's Digest, volume 1, were not brought to the notice of either the Special Court deciding Ma Bwin's case or the Judicial Commissioner, who decided Mg.Me's case (10). Though the ultimate decision would have been the same, these texts might at first sight seem to support the view that at some time in the past, it is possible that testamentary powers were exercised, and that the law permitted property to be disposed of on the death of the owner according to the directions given before his death.

Pyumin: ".... what the dead gives the living get....."

Râsi: "A gift of property made by one to take effect on his or her death is valid, and the donee shall get the property...."

Râjabala: "A gift made to take effect on the death of the donor is valid....."

---

(8) (1880) S.J.95.

(9) Ma Tin Shwe v. Mg.Kan Gyi, (1889) II U.B.R.(1897-1901) 142;
Ma Pwa Swe v. Ma Tin Nyo, (1902) II U.B.R. (1902-3) Gift 1;
Ma Thin Myaing v. Mg.Gyi, (1923) 1 Ran. 35;
Ma Nu v. Ma Gun, (1924) 2 Ran. 388;
San Paw v. Ma Yin, (1918) 12 B.L.T.207;
Ma Kyaw v. Ma Mi Lay, (1928) 6 Ran.682.

(10) U E Maung, Burmese Buddhist Law, 114.

Kyannet: "Propetty left to a person by another on his or her death becomes the separate property of the donee and is not subject to partition (11)."

Rajabala: "A gift made by a rahan to take effect after his death is invalid (12)."

It may be that some form of testamentary dispositions was known to the authors of some of the Dhammathats; their learning in Buddhist eclesiastical lore made them acquainted with 'acchayadanam'; and, on the authority of Buddhaghosa, they declared such donations, to effect on death, permissable to laymen though prohibited to rahans. But the innovation, they attempted to introduce, never did become part of the secular laws of the Burmese people (13).

2. Evasions of the principle.

(a) By Gift.

It is inevitable in a developing civilisation that attempts will be made to evade the rule against testamentary disposition, though in Burma such attempts met with but little success.

The principle of intestacy cannot be evaded by an attempted transfer inter vivos to take effect upon the death of the donor (14).

---

(11) Digest I, section 78.
(12) Digest I, section 399.
(13) U E Maung, Burmese Buddhist Law, 114.
(14) Ma Pwa Swe v. Ma Tin Nyo (1902) II U.B.R.(1902-3); Buddhist Law, Gift 1;
Ma Thin Myaing v. Mg.Gyi, (1923) 1 Ran. 351;
Mg.Thu Ka v. U Thuranda, (1927) 5 Ran. 371;
U Tezawunta v. Mg.Zaw Pe, (1932) 10 Ran.224.

In Ma Thin Myaing v. Maung Gyi (15), a mother made a gift of land by a deed of sale to three out of her five children, subject to accondition that the conveyance would not become effective before her death. It was held that a Burman Buddhist cannot dispose of his property after his death by Will, and no Burman Buddhist can under the guise of making a gift be allowed in effect to make a Will. Robinson,C.J., said (16), "It is open to any Burman Buddhist to make a gift, or an alienation of some of his property during his lifetime; but it is not open to a Burman Buddhist to make a Will or a gift that would have the effect of disposing of his property after his death, contrary to the terms of Buddhist Law as to inheritance."

In Maung Thu Ka v. U Thundnda (17), the owner of certain immoveable property purported to make a gift of the same reserving to herself the right to use and occupy the same during her lifetime and directing the donee on her death to dispose of the property and the proceeds in a certain manner set down in the deed; the conveyance clearly evidenced the intention of the owner of the property which she desired to be carried into effect after her death and the Courts held that they were in effective. In Ma Pwa Shwe v. Ma Tin Nyo (18) it was laid down

---

(15) (1923) 1 Ran. 351.
(16) (1923) 1 Ran. 351 at 359.
(17) (1927) 5 Ran. 371.
(18) (1902) II U.B.R. Buddhist Law, Gift 1.
(1902-3)

that in dealing with transactions of this kind the first question is whether it is a gift, a trnasfer inter vivos, in which case the general law applies, or whether it is a transfer to take effect on the death of the donor in which case the personal law, and the principle of intestacy applies.

(b) Assignments of Insurance Policies and Provident Fund Nominations.

The gratuitous assignment of a life endowment policy was held to be a testamentary disposition and therefore invalid amoung Burmese Buddhists (19).

The nomination of a person to receive payment from an association or a provident fund on the death of a subscriber was held in 1924 to be a testamentary disposition and therefore ineffective in so far as it purported to confer a beneficial interest on any person other than the heir at Burmese Buddhist Law (20), but, at that date the Provident Funds Act (IX of 1899) then in force did not contain any provisions enabling a subscriber to over-ride the personal law governing devolution of his estate on death. But subsequently this Statute was repealed and replaced by the Provident Funds Acts (XIX of 1925) and Section 5 (1) of this Statute provides:-

---

(19) Daw Khin v. Ma Than Nyun, Civil Regular 441 (1920) Chief Court of Lower Burma, quoted in Ma Nu v. Ma Gun, (1924) 2 Ran. 388 at 389.

(20) Ma Nu v. Ma Gun, (1924) 2 Ran. 388.

"Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any other law in force ..... any nomination duly made in accordance with the rules of the fund which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositer shall be deemed to confer such right absolutely until such nomination is varied by other nominations."

In Ma Kyway v. Ma Mi Lay (21), a Burman Buddhist, an employee of the Burma Railways, was a subscriber to the Railway Provident Fund. Before the Act of 1925 came into force he nominated his sister to receive the sum standing to his credit in the provident fund on his death. The new Act applied to the Burma Railways Provident Fund, but the subscriber made no fresh declaration and died in February 1928. His widow, who was his sole heir at Burmese Buddhist Law, claimed the money. It was held by the trial and appellate Courts that the provisions of section 5 of the Provident Funds Act (XIXof 1925) enabled a Burman Buddhist to make an effective nomination, though such nomination, being in the nature of a testamentary disposition, i prohibited by his personal law. Therefore, the sister was entitled to her husband's deposit. It is submitted that this is still the correct proposition of law in Burma.

---

(21) (1928) 6 Ran. 682.

(c) Death-bed gifts.

The real ground upon which in ancient times it was considered desirable that when a man's dissolution was imminent he should not be allowed to make a death-bed gift was that it was deemed necessary to prevent him yielding to impulses arising out of his situation and crippling his family by dissipating the material sources from which it derived its livelihood. In Burma, as in other agricultural countries, most families depend for their means of subsistence upon being able to possess and cultivate a sufficient area of land. It is one of the basic human freedoms that during a man's lifetime he may do what he likes with his own; but it is far from being generally recognised that this freedom includes the right to make such a disposition of his property inter vivos as would necessarily have the effect of depriving the family after his death of the property from which it obtained its livelihood. It was probably for that reason, as it seems, that it was laid down that any transfer inter vivos which would have the effect, and which was made with the intention, of operating after the death of the transferors should be regarded as invalid as against the heirs, because the effect of the transfer might well be to transfer to a stranger the family property for which the members of the family obtained a livelihood. The Burmese Buddhist Law extends the principle of intestacy to the donatio mortis causa and prevents a man at the point of death from making such a

disposition, because at such a time it must necessarily be his intention that the gift should operate not during his lifetime but after his death (22). In Manu-Vannanâ Dhammathat, section 344, it is laid down that:

"When parents are lying or stricken down never to rise again while on their death-bed, if either of them give their property to another person (i.e. a stranger), such a gift of the property is invalid, and it shall be divided and shared as inheritance."

It is stated that a death-bed gift is one made when the donor is 'on the couch from which he is never to rise again' (23) or a'gift made in contemplation of death.' (24). These statements are too vague to define the essential elements of a death-bed gift. Death-bed gifts are dealt with in the Dhammathats of which appropriate extracts are collected in section 79 of Kinwun Mingyi's Digest of the Burmese Buddhist Law, volume 1. The Kaingza text is as follows:

"A gift of slaves and other property made in extremis is not valid. Such property is considered as inheritance. A gift made, though not in extremis, is invalid if delivery of possession has not taken place before the death of the donor, and it shall revert to the estate; but if there has been delivery of possession the co-heirs cannot claim it.

---

(22) See page C.J., in Ma Mu v. U Nyun,(1934)12 Ran.634 at 653.
(23) U May Oung, Leading cases on Buddhist Law, 162.
(24) S.C.Lahiri, Burmese Buddhist Law, 240.

The above rules refer to children living with the parents, a gift does not take effect even when there has been delivery of possession, because children living with the parents are still under parental control."

The expression "in extremis" which appears in the official translation of the texts reproduced in the Digest is a paraphrase, or very free translation of the words of the authors.

The terms employed in the Burmese extracts are as follows:-

Kaingza:- ၆ ၁၁ ခါ နီ: ဝယ် ၆ ညာဉ် ၆ ဖာဉ်: တက် နိုက်။

= while on (his) death-bed about to breathe his last;

Kandaw:- ၆ ၁၁ ခါ နီ: ဆုံ: ဖြစ်, ၆ ညာဉ် သက်ဆုံး ဝတ်။

= at (the royalties or aristocrats') death-bed about to breathe (his) last and to come to an end of (his) life;

Vannadhamma:- ၊ခ ထ ၆ ၁၈ အိပ် ကြင်: ပြုံကျိုး: အိပ် ရာ ပြစ်ခြေ ပ ၆ ခြေ ၊ ၆ ညာဉ် ၆ ဖာဉ်: နိုက်။

= while on the middle of (his) death-bed which is (his) sleeping place where he sleeps to awake no more;

Râsi:- ၆ ၁၁ ခါ နီ: ၆ ညာဉ် ၆ ဖာဉ်: ဝတ် နိုက်။

= while on (his) death-bed about to breathe (his) last:

Pâṇaṁ:- အုံ: အိပ် ရာ ဝယ်, ခ န္ဒာ ပြုတ်၆ ကြွ, ၆ ၁၁ ပ ခါ တ နှံ,

= while lying on the bed when the mortal body must die as the time for its death is come. The Burmese word 'nyaung-zaung' appearing in the extracts from the Kaingza, the Vannadhamma and the Rasi by itself means 'bed' only. Similarly each of the words 'nyaung tha lun' and 'lon-eik-ya' appearing

in the extracts from the Kandaw and the Panam respectively by itself means no more than 'bed'. But when each of these words is taken together with the remainder of the phrase in which it appears or is read in the light of the context, it becomes evident that the bed referred to must necessarily be the death-bed. Mya Bu, J., said (25),.

"The ordinary meaning of the Latin expression 'in extremis' is 'at the last gasp', 'in extremity (of a person at the point of death implying mortal illness under which the sufferer, if conscious, is aware that his end is near)'. It is clearly deducible from the Burmese phrases that what is known as a 'death-bed gift' under the Burmese Buddhist Law is a gift made while the donor is in-fact on his death-bed and about to die, or in other words, when his death is imminent. In my opinion the gift must also be made by the donor in the hopeless expectation of death, or, as observed by their Lordships of the Privy Council in Ebrahim Goolam Ariff v. Saboo(26) "under pressure of the sense of the imminence of death."

In this case, Daw Saw by deeds gave the respondent 'outright' a piece of land to enable him to build a monastery. She had been ill for a few months and was weak and infirm and contemplating an early death at the time of the making of the gifts. She got the deeds registered though she had to be

---

(25) U Tezawunta v. Mg. Zaw Pe, (1932) 10 Ran. 224.

(26) (1908) I.L.R. 35 Cal.1.

carried from her village to the registration office. It was held that when such a transfer was made by a Burman Buddhist whose death was imminent, and who was under an apprehension that his dissolution was at hand, it was a death-bed gift and a presumptio juris et de jure arose that the transferor intended the transfer to become operative after his death. The gift, therefore was declared invalid. It is submitted that Mya Bu J. has gone too far in giving the above definition of death-bed gift and in declaring the above gift as invalid, for he has introduced a Mohammedan rule into Burmese Buddhist Law, for which there is no justification. Under Mohammedan Law, the proper test for death-bed disposition is whether the testator made it under pressure of the sense of imminence of death (27). Inability to attend to the ordinary avocations is a sine qua non of the application of this doctrine in Mohammaden Law (28). There is no such provision in the Dhammathats. Such gifts, according to the Dhammathats, made in in extremis or during the life-time of the donor is invalid if unaccompanied by delivery of possession; but if delivery or possession has actually taken place, as in this case, the gift should be valid and the donee should get it (29).

---

(27) Ebrahim Ebrahim Goolam Ariff v. Saiboo, (1908) I.L.R. 35 Cal.1; See also K.P.Saksena, Muslim Law as administered in India and Pakistan, 337.

(28) Karimannisa v. Hamedulla, (1926) Cal. 401.

(29) Digest. 1, section 79.

According to Page,C.J., (30), "When such transfer is made by a Burmese Buddhist whose death is imminent and who is under an apprehension that his dissolution is at hand, it is commonly called a death-bed gift and a presumptio juris arises that the transferor intended the transfer to become operative after his death."

The question whether Buddhist Law is applicable to death-bed gifts was discussed in Ma Pwa Swe v. Ma Tin Nyo (31), where objection was taken to a registered deed of gift, without delivery of possession, made on his death-bed by a husband to his wife. It was held that such a gift "would enable a Buddhist to defeat his own personal laws and practically to dispose of his property by a method which would be, in all essentials, equivalent to a Will, "and hence that the question must be regarded as one concerning inheritance, since to hold that the gift was valid would render the ordinary rules of inheritance inoperative. Such gifts are, therefore, invalid. It is to be noticed that in all these cases the gift was to take effect only in the event of the death of the donor. In U Kya Bu v. Maung Aung Thein (32), it was held that in order to prove the death-bed gift under Burmese Buddhist Law, it must be shown that the donor was, in fact, on his death-bed and had no hope of recovery at the time of making the gift. In the absence of

---

(30) Ma Mu v. U Nyun, (1934) 12 Ran. 634.
(31) (1902) II U.B.R.B.L. Gift 1.
(32) (1946) Ran. 139.

such circumstances there is no rule of law whereby a sick man is prevented from the disposition of every item of his property, provided the disposition is to take effect at once.

The texts quoted in section 79 of Kinwun Mingyi's Digest, volume 1 appear to make an exception in favour of gifts accompanied by delivery made by parents to children who are living apart from them; but as pointed out by U May Oung (33) such exception was made at a time when their share in the parent's estate was very much less than that of children living with parents (34), and it is questionable whether it can apply at the present day since equality of division has been made the rule with regard to all children. As regards death-bed gifts to strangers, i.e. persons other than prospective heirs to the donor, the Manu Vanna text reproduced in section 344 of the Digest, volume I lays down that they are invalid, and so it has been held in U Naga v. Maung Hla (35).

It must be noted that a gift made in extremis is not necessarily equivalent to a donatio mortis causa, in which case a person who is ill, and expects to die shortly of his illness, delivers to another the possession of property to keep as a gift if the donor shall die of that illness. Such a gift has in effect the nature of a legacy, and appears to be valid under

---

(33) Leading cases on Buddhist Law,183.
(34) Digest 1. 74.
(35) (1908) II U.B.R.(1907-09) Buddhist Law Gift,7.

section 78, Digest 1. But the texts there cited do not refer to cases where the parents are ill or dying, and it must be said that the true donatio mortis causa is unknown to Buddhist Law. In Maung Kyaw v. Maung Shwe Yo (36), however, where a mortgagee of certain lands shortly before her death sent for the mortagagor's representative and in her presence made over the mortgage deed to a third person as a trustee for her (the mortgagee's) grandchildren and told the mortgagor's representative that if she wanted to redeem she must pay them, - the Special Court held that it was a valid donatio mortis causa and upheld the gift. It may be asked whether such gifts do not offend against the rule of non-testation by Burman Buddhists.

Instances of death-bed gifts.

A lady in her last illness gave a house to her son with the consent of her husband; a year after the lady's death the husband remarried and claimed the house as his atetpa property at his second marriage; at the boy's shinbyu ceremony the boy's father confirmed the gift; in a suit between the boy and stepmother, it was held that the original death-bed gift was not valid under the Buddhist Law for want of delivery of possession and that even the shinbyu gift was not valid as the husband alone could not give away the house without the second wife's consent. (37).

---

(36) (1893) P.J. 9 at 12.
(37) Maung Ba Aung v. Ma Pa U,(1907) 1 B.L.T.57.

A man on his death-bed transferred by two registered deeds paddy lands to his nephew requesting him to sell the same after his death and devote the sale proceeds for religious purposes. Four days later the man died leaving his widow. The nephew sold the paddy lands. In a suit between the widow and the nephew it was held, that, as the death-bed gift was not made in favour of an heir it was invalid under the Buddhist Law; furthermore it was in the nature of a testamentary disposition contrary to the provisions of the Buddhist Law (38).

Eleven days before her death, a lady, in full consciousness of her approaching death, executed a deed in favour of her sister releasing all her rights in the share or interest to which she was entitled in the undivided ancestral property in consideration of the necessaries supposed to have been supplied to her by the donee. The deed was in effect a death-bed gift. On her death her husband and children filed a suit against the donee to adminster her estate. It was held that the consideration was illusory and that the deed, if it could take effect at all, could only take effect as a death-bed gift, which is not within the competence of a Burman Buddhist (39).

(d) Family Arrnagements.

It sometimes happens that the special circumstances of a family render adherance to the rules of the Dhammathats either

---

(38) Maung Ba Maung v. Maung Pyu, (1917) 40 1. C.854.
(39) Ma Pwa Sein v. Mg.Ba Saw, (1929) A.I.R. Ran.243.

inconvenient or inequitable in distributing the estate of a deceased Burmese Buddhist; it may also be that preservation of good relations within the family or saving of the family honour, render desirable a departure from rules of succession and partition laid down in the Dhammathats. The Courts under such circumstances are not averse to recognizing arrangements made by consent between the claimants, provided they are made in good faith, even if the terms of the arrangement conflict with the rules of the Burmese Buddhist Law (40).

Thus in Mi Thit v. Maung To Aung (41) it was said that, amoung Burman Buddhists the father, foreseeing that the heirs may quarrel about the division of property on his death, not unfrequently arranges a special contract before his death amoung his heirs whereby they bind themselves to accept a certain method of partition: such an arrangement does not usually give them a cause of action against him during his life. More frequent are cases of arrangements, and divisions made after the death of one or both parents either by mutual consent or by village elders as arbitrators. It is the policy of the law to uphold such contracts. Jardine, J.C., said further (42),

"I am convinced that in the Burmese family system the

---

(40) U E Maung, Burmese Buddhist Law, 117.
(41) (1883) S.J.197.
(42) (1883) S.J.197 at 200.

reasonable is to precede the legal; disputes are to be settled, not as under the system of English Courts by undeviating arithmetical rules and compulsory decrees, but by contracts and compromises based on mutual consent obtained by argument and expostulation amoung themselves and persuasion of elders, all parties appealing more or less to what is right and more or less allowing themselves to be governed by these considerations. I think it necessary to point out to the Courts the great difference between a decree of a Court which has nothing to do with mutual consent and the family contract or arbitrators' award, which is the result of express consent and usually preceded by full knowledge of every circumstance of the life of the particular family."

In U Thumana v. Ma Saing (43), it was held that a family compact whereby the income of property had been enjoyed for many years in definite shares agreed upon by the parties operated as estoppel to a suit by one of them who was entitled to the whole property.

In Tafuzzal Ahmed v. Maung Shwe Kyi (44), a Burman Buddhist ten days before his death told his children by his predeceased first wife to give certain specified properties to his second wife in lieu of her share in his estate and the wife expressed her consent to it. Three days after her hsuband's death the widow

---

(43) (1892-96) II U.B.R.A. 390.
(44) (1929) A.I.R. Ran. 335.

accepted the properties worth one-sixth of the value of her share in the estate allowing it to be understood that she would not make any further claim to the estate. Later on by a registered deed she sold her share in the estate to a stranger. The purchaser claimed the widow's share and the step-children resented the claim relying on the widow's oral release. It was held that the widow's consent to the contract was not free as it was largely influenced by the disturbed state of her mind, and that as the contract was inequitable, and as she gave up her undoubted rights for a grossly inadequate consideration without any professional assistance, and as there was no proper deed of release, her title to her share in the estate still vested in her when she sold away her share.

It must, however, be remembered that such arrangements, are enforced as being bona fide settlements of existing disputes; a bona fide compromise of a claim, neither frivolous nor vexatious is a good consideration, whether the claim would have been successful or not; an agreement supported by it would be enforced as a binding contract. That the binding force of such arrangements is not derived from any custom peculiar to the Burmese Buddhists was recognised by Jardine,J.C., who in Mi Thit v. Maung To Aung (45) stated,

"When the members of a family agrees among themselves as

---

(45) (1883) S.J. 197.

to the division of property on the death of the owner, the validity of the agreement depends more probably on the Contract Act than on the rules of Buddhist Law, and the Courts of Civil Law will enforce the contract in their jurisdiction of equity and on the ordinary principles of Courts of Equity."

The mistake, made in good company (46) that the family compact or the family arrangement is part and parcel of the customary law of the Burmese Buddhist and that such arrangements are favoured in that system of law is the result of taking, isolated from its context, a statement of Jardine,J.C. in Mi Thit's case, "Among the Burmese Buddhists, the father foreseeing that the heirs may quarrel about division of the property on his death, not infrequently arranges a special contract before his death among these heirs, whereby they bind themselves, to accept a certain proportion, or a specified areas of land, or a certain number of cattle, or particular chattels." Vinicchayarasi at section 79 of Kinwun Mintyis Digest, volume 1, makes it clear that there exists no legal sanction for such a contract; the children are merely exhorted to respect the dying injunctions of their parents. Jardine,J.C., recognized this, for he placed such a contract among matters which have not yet become rules of law or higher than rules of conduct (47). If it is viewed as

---

(46) Ma Ma Gyi v. Daw Thwe,Civil Regular No.562 of 1925 on the Original Side of the High Court of Judicature at Rangoon quoted in U E Maung,Burmese Buddhist Law,118.

(47) U E Maung, Burmese Buddhist Law,119.

a matter of contract between the prospective heirs, the arrangement offends the rule against dealings in expectancies (48). Thus, it was held in Dhar v. Htoon May,(49) that the prohibition contained in section 6(a) of the transfer of Property Act against the transfer of an heir-apparent's succeeding to an estate applies to estates governed by Burmese Buddhist Law. The chance of an heir succeeding to an estate is neither transferable nor releasable. Any arrangement as in Mi Thit's case would not be enforceable per se; but if the death of the ancestor, the heirs act upon it, it may be considered to be an oral partition in accordance with the contract, and as the law does not require that partition should be effected by a document, the Courts would refuse to disturb a completed partition (50).

(3) The Introduction of Testamentory Capacity into Burmese Buddhist Law.

It has been pointed out that although, originally, there was much similarity between Burmese and Kandyan laws in the rules governing disposition of property by the owner before his death, the power of testamentary alienation did not develop in Burmese Law as it did in Kandyan Law. Nevertheless, attempts have been made in Burma to evade the rules prohibiting

---

(48) Annada Mohan v. Gour Mohan, (1923) 50 I.A. 239; Dhar v. Htoon May,(1919) 12 B.L.T.106.
(49) (1919) 12 B.L.T. 106.
(50) Maung Po Kin v. Maung Shwe Bya, (1923) 1 Ran.405.

testamentary dispositions. Even though these attempts have failed, they raise the question whether legislation is necessary to introduce into the Burmese Buddhist Law the concept of a testamentary instrument.

It is submitted that Testation is impracticable as well as inexpedient in Burmese Buddhist Law. According to Burmese notions, the wife is "considered as practically on an equality with the husband, and she generally takes an equal part in the management of the family affairs. Consequently she has for the most part an interest equal to her husband's in the family property and when her husband dies this interest is carefully protected by the law of inheritance (51)." In such a system, where the interest of a husband and wife in all property acquired during coverture is joint, and indivisible except on divorce, there seems to be no room for an institution which cannot but tend towards disturbing the harmony of wedded life. The progress made in Burma towards the emancipation of women would probably not have been so marked as it has been if the idea to testamentary power, even if known, had commended itself to the men. The Burmese Buddhist couple is more truly 'one' than any other; to enact that the husband or the wife might dispose of his or her share in the joint property without the knowledge or consent of the other would remove the most effective safeguard of the marriage tie. The possible discouragement of

---

(51) Mi Lan v. Maung Shwe Daing, (1892-97) II U.B.R. 121.

selfish behaviour on the part of one spouse by the others freedom to dispose of his other interest in the property of the marriage would be of small importance compared with the feelings of mutual suspicion and distrust which it would certainly engender.

There are, moreover, practical difficulties. The husband's and the wive's share is not always fixed. The rights of the eldest son or daughter, the interests of children by a previous union who have not claimed partition on their surviving parents subsequent marriage, for example, create unavoidable complications.

Hence, unless and until the legislature is prepared to brush aside rights and interests peculiar and advantageous to the people of Burma, and enjoyed by them from time immemorial, and to ignore the clear injunction of Buddhism that a man must make due provision for his wife and children - meaning thereby all his wives and all his children (52), the introduction of the Will, an instrument not without its advantages but yet capable of being used to injure and oppress, is undesirable.

4. Second principle: the Non-ascent of Inheritance.

It is a fundamental principle of Burmese Buddhist Law of inheritance that the wife is the sole or the chief heir to her husband and that the husband is the sole or the chief heir to

---

(52) U May Oung, Leading Cases on Buddhist Law, 209.

his wife. Except when there is an Orasa child capable of taking a quarter share and except in respect of certain very restricted classes of property, the survivor of a Burmese Buddhist couple excluded the children and all the kindred of the deceased husband or wife (53).

Subject to the right of the surviving spouse, and to the exception hereinafter noted, the estate of a deceased person will devolve in the first instance upon his decendants to the exclusion of all others (54). This is based upon an analogy of nature. Vaṇṇanà (55) says, "the waters of a river never flow to the source but downwards." The reason is because it is likened to the waters which flow into the ocean, which is their destination.

But there is a limit to this principle of descent. Again, a natural analogy is taken as a guide, "though the waters have arrived at their destination, they more or less somehow or other flow back to the source (56). So where property devolving on death cannot find an heir by descent, it ascends.

In Burmese Buddhist Law inheritance shall not ascend where it can descend. This ordinarily means that where there are

---

(53) Digest 1, 364-375;
Ma Gun v. Ma Gun, (1874) S.J.33;
Mi Pyu v. Mi Bon Dok, (1874) S.J.35;
Mi Saw Myin v. Mi Shwe Thin, (1912) I U.B.R.125;
Ma Sein Ton v. Ma Sein, (1915) 8 L.B.R.501(F.B.);
Mg.Ohn Khin v. U Nyo, (1931) 10 Ran. 124;
(54) Ma Kyaw v. Mg.Po Myit, (1925) 3 Ran. 86;
Ma Hnin Bwin v. U Shwe Gon,(1914) 8 L.B.R.1(P.C.).
(55) Section 46. (56) Section 46.

heirs in the descending line from the deceased, ascendants and collaterals are excluded (57). A Burmese Buddhist's natural heirs are his or her spouse relict and children; parents, brothers and sisters and their issue have, ordinarily no right to share in the estate if the propositus leaves a single child or grandchild; the rule extends to adopted children, - fully to kittima and partially to apatittha. The principle has also been applied to step-children and step-grandchildren; and even illegitimate issue are sometimes allowed to come in (58).

To the fundamental principle of Burmese Buddhist Law that inheritance shall not ascend if it can possibly descend there is a logical corrolory that inheritance must not ascend more than necessary (59).

Attasankhepa says (60), "After the division of inheritance one of the co-heirs dies, leaving neither wife nor child, inheritance should always descend, and let the younger brothers and sisters of the deceased inherit the property. But failing juniors, inheritance may ascend and let the elder relatives of the deceased, like elder brothers or sisters, or even parents and grandparents succeed to the estate."

Manugye (61) says, "All kinds of inheritance shall only descend i.e. children, grandchildren and greatgrandchildren only

---

(57) Manugye, X,17-18; Digest 1, 310.
(58) U E Maung, Burmese Buddhist Law, 211.
(59) Mg.Chit Kywe v. Mg.Pyo,(1895)II U.B.R.(1892-6)184.
Ma Kyaw v. Mg.Po Myit,(1925) 3 Ran.86.
(60) Section 211. (61) X., 1.

shall inherit." The extract from the same Dhammathats in the Digest (62) says, "The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs. This rule is based on the fact that the Buddha, who stood in a quasi-parental relation to his disciples, had the right to accept gifts made in their favour. Similarly in the absence of parents, brothers, sisters, and children, grandparents become the sole heirs."

In the absence of all other heirs, the six relatives of the husband and of the wife (63) suceed to the estate. But if grandparents are living, their claim overrides that of the six relatives. The water brought down by all rivers and streams must eventually flow into the ocean."

Elsewhere Manugye (64) says, "If the deceased has no father, mother, sons, daughters, or relations, (brothers and

---

(62) Digest, 1, section 311.
(63) Manugye, Book X., section 56:- "The six relatives of the husband and the six of the wife who shall inherit, are these The husband's mother's elder and younger sisters, his mother's elder and younger brothers, his uncles by the father's side, and aunts by the father's side; these are the six relatives out of the direct line of the husband; the wife's mother's elder and younger sisters, her mother's elder and younger brothers, uncles by the father's side, and aunts by the father's side; these are the six relatives of the wife out of the direct line; and these twelve relatives it is said shall inherit."
(64) X. 19.

sisters,) the law by which the grand-father and mother inherit is this: If there be none of the above-named heirs, six (degrees of) relatives of the husband and six of the wife are laid down as heirs; but if the own grand-father and grand-mother are alive, they shall inherit before these six relatives.

U Tha Gywe (65) expressed, without authority, the opinion that the uncle would exclude the nephew on the principle that the nearer excluded the more remote, while May Oung (66) was of the opinion that they would share equally.

In Ma Tin v. Ma Shwe Sint (67), it was held that the dominant principle is that of non-ascent and it is only when that is exhausted that the rule of propinquity is applicable, and so nephews exclude uncles. It was admitted in this judgement that neither in the Dhammathats nor in the cases was there any authority for this, but it was held that the principle of non-ascent was fundamental.

Following the rule in Manugye X, 18., it was held in Maung Tu v. Ma Chit (68) that the inheritance is said to ascend if it goes not merely to a previous generation, but if it goes from a young brother to an elder. Hence the younger brothers and sisters of a deceased person exclude from inheritance the elder

---

(65) Conflict of Authority in Buddhist Law, Vol.11.111.
(66) Leading cases on Buddhist Law,273.
(67) (1926) 4 Ran. 27 (F.B.).
(68) (1926) 4 Ran. 62.

brothers and sisters (69). Logically, therefore, if the youngest of several brothers or sisters dies childless, the second youngest brother or sister should exclude the remaining survivors from any share in the estate of the deceased. The principle has, not, however, been extended to such cases, the general rule being that, where there are no descendants, the surviving co-heirs inherit equally (70). In Kan Gyi v. Ma Pyu (71) it was held that the surviving paternal and maternal uncles and aunts of the propositus, should, in the absence of nearer relatives, share equally in the estate, irrespective of the father of the propositus having predeceased the mother or vice versa.

Half brothers and half sisters exclude the maternal grandmother of the deceased (72).

Stepchildren and step-grandchildren of the deceased exclude the latter's collateral relations by blood (73).

A half brother and a half sister of the mother of a deceased person exclude the full cousin of the father of the latter (74).

---

(69) Mg.Tu v. Ma Chit, (1926) 4 Ran.62; see also, Lim Kam Gion v. Mrs Iris Maung Sein,(1955)B.L.R.15(S.C.).

(70) Mg.Hmaw v. Ma On Bwin, (1901)1 L.B.R.104: Kan Gyi v. Ma Pyu, (1912) 6 L.B.R.164.

(71) (1912) 6 L.B.R. 164.

(72) Ma Gyi v. Ma Khin Saw,(1922) 11 L.B.R.460.

(73) Mg.Dwe v. Khoo Haung Shein,(1924) 3 Ran.29(P.C.).

(74) Ma Kyaw v. Mg.Po Myit,(1925) 3 Ran. 86.

(This case is also an illustration of the rule that if the inheritance must ascend it shall not do so more than necessary. In order to reach the half brothers and sisters the line of inheritance ascends twice and descends once; whereas to reach the full cousin it has to ascend three times and descend twice).

A stepbrother of a deceased person excludes the maternal aunt of the latter (75).

5. Exception to the Second Principle.

If, after the death of the parents and before division of their property, an unmarried child dies, the surviving brothers and sisters of the latter are entitled to share equally in the property of the deceased child (76).

The younger brothers and sisters of a deceased person are under the general rule, ordinarily preferred to the elder brothers and sisters (77), but where the property of the deceased person consists of an undivided share in the property of the deceased's parents, then by virtue of the provisions of Manugye (78) the surviving brothers and sisters share equally therein.

---

(75) Mg.Kyaw Sein v. Ma Min Yin,(1921) 4 U.B.R.20.
(76) Mg.Ba v. Mai Oh Gyi (1931) 10 Ran.162.
(77) Mg.Tu v. Ma Chit, (1926) 4 Ran. 62.
(78) Book X.,Section 17. "If after the death of the parents,and before the division of the property left, an unmarried child shall die,the law for the partition of the deceased child's effects amongst the relations (brothers and sisters) is, that they shall share in equal proportions".

6. Third principle: the Exclusion by the nearer of the more Remote.

In Maung Hmaw v. Ma On Bwin (79), a Bench of the Chief Court held that "it is a principle of Buddhist Law that only those closely related should inherit and that relations of the same degree should inherit to the exclusion of those of a more remote degree."

This is the opposite of the principle of representation. In order to ascertain the heirs of a deceased person, the rule as to the non-ascent of inheritance is first brought into operation (80); and it is only after that rule has been applied that resort is had, if necessary, to the rule that the nearer excludes the more remote. Thus, in the case of a person dying unmarried, the application of the former rule may lead to the exclusion of all relations except a paternal uncle and maternal cousin of the deceased. The utility of the first rule is now exhausted, but by virtue of the second the cousin is excluded and the uncle becomes the sole heir. (81).

In Maung Po Thu Daw v. Maung Po Than (82), the question arose as to the succession of grandchildren to their grandparents; all the parents had predeceased the grandparents, and the question was whether the grandchildren inherited per stirpes or per capita. The District Court said that the usual rule of

---

(79) (1901) 1 L.B.R. 104.
(80) Ma Tin v. Ma Shwe Sint, (1926) 4 Ran. 27 (F.B.).
(81) U Pe Gyi v. U Pyo, (1925) 3 Ran. 271.
(82) (1923) 1 Ran. 316. (F.B.).

Buddhist Law is that grandchildren share per stirpes and not per capita and cited Ma Thaw v. Ma Sein (83) and Maung Kyaw v. Ma Tu (84) as authorities.

The question in Ma Thaw v. Ma Sein (85) was whether a cousin by adoption could inherit. Moore,J., said, "The usual I think universal, rule of Buddhist Law as regards heirs more than one degree remote is that they succeed by right of representation. Grandchildren or nephews and nieces accordingly share per stirpes and not per capita." But it does not appear from the judgment that the question was discussed and no authority was cited for the view expressed. In Maung Kyaw v. Ma Tu (86), the sole surviving heirs were two sets of nephews and nieces, one set being the children of a deceased brother, and the other set the children of a deceased sister of the intestate. It was held by Copleston,C.J., after consulting the Kinwun Mingyi and the Westmasok Wundauk that the division among these heirs should be per stirpes and not per capita. But May Oung (87) questions this decision, and points out that it was very largely based on an admission by counsel that, had the heirs been lineal descendants of the intestate, the division would be per stirpes.

---

(83) (1908) 5 L.B.R. 89.
(84) (1895) II U.B.R. (1892-6) 189.
(85) (1908) 5 L.B.R. ~~(1892-6) 1~~89.
(86) (1895) II U.B.R. (1892-6) 189.
(87) Leading cases on Buddhist Law, 279-280.

Carr,J., in Maung Po Thu Daw's case (88) pointed out that counsel's admission in the above case was based on section 65 of Sparke's Code, where it is specifically laid down that in the Buddhist Law of inheritance, the lineal descendants of any person deceased represent their ancestor, that is, stand in the same place as the person himself would have done, had he been living, and take what the ancestor they represent would have had.

Carr,J., went on to say that there was no more reason for division per stirpes in the case of lineal descendants than in the case of other relatives, and that, in the case of other relatives, the rule of the nearer excluding the more remote operated absolutely. A surviving uncle or aunt excludes cousins (89) and a surviving brother or sister excludes the children of a deceased brother or sister (90). Grandchildren are not entirely excluded by surviving children; the children of the predeceased orasa receive their parents' share; the children of younger pre-deceased children receive one-quarter of what their parents would have got, if alive, (91) (but this clearly forms an exception to the general rule; it does not establish representation as a rule).

---

(88) (1923) 1 Ran. 316 (F.B.) at 321.
(89) Kan Gyi v. Ma Pyu, (1912) 6 L.B.R.164.
(90) Mg.Hmaw v. Ma On Bwin, (1901) 1 L.B.R. 104.
(91) Po Sein v. Po Min, (1905) 3 L.B.R. 45.

In the course of his argument before Carr,J., (92), U Thein Maung conceded that the texts cited in Digest I, 257-259 contemplated grandchildren taking per stirpes as against surviving grandparent, (but it is only a partial representation as to one-quarter). Section 260, 262, 264, 267, 270, 275 of the Digest, I, Manugye X, 20. Attasankhepa 225, 226, all contemplate division per capita.

In the course of his judgment in Maung Po Thu Daw's case (93), May Oung J., said that the questions whether grandchildren took per stirpes or per capita, and whether grandchildren succeed by representation were not covered by direct authority in the Dhammathats or in the decided cases. He referred to the Vannadhamma text in Digest I, section 86 which stated that there were four classes of heirs, namely children, grandchildren, great-grandchildren; those standing in close relationship to the ancestor should get two shares and those distantly related one. There shall be equal partition amoung those standing in the same degree of relationship. (The last sentence surely suggests division per capita). He also pointed out that the Dhammasâtra extract suggests a doubt as to whether proximity of relationship or joint residence is the necessary qualification. May Oung J., then referred to the elaborate methods of unequal

---

(92) In Mg.Po Thu Daw v. Mg.Po Than, (1923) 1 Ran.316(F.B.)at329
(93) 1 Ran. 316 (F.B.) at 331-334.

division in Manugye X, 13, 14, 60, 61 and 72 ending with an admonition in X 81 apparently in favour of equal divisions which led to the decision in Ma Kyi Kyi v. Ma Thein (94). The texts in Digest I, 86 refer to grandchildren as a distinct class of heirs and this seems to indicate that grandchildren are regarded as inheriting directly from the deceased grandparents when their own parents have pre-deceased the latter. In competition with surviving uncles and aunts, they are subject to certain definite rules, those set forth in sections 162 to 164 of the Digest as modified by modern decisions, but where there is no surviving uncle or aunt, the Dhammathats have not laid down any decisive rule of division interse. As against a surviving grandparent who remarries or a step-grandparent, they are given a certain collective share but there is nothing to show how that there is to be apportioned among them. He said further that if the text writers had contemplated division per stirpes, they would have said so. They prescribed minute rules for partition among various sets of heirs. He held, therefore, that in the absence of any clear rule to the contrary, the grandchildren succeed to their grandparents estate in their own right and the division among them should be 'per capita' and not 'per stirpes'.

From this, the enunciation of the main rule in Maung Shwe

---

(94) (1905) 3 L.B.R. 8.

Ye v. Maung Po Mya (95) necessarily followed. It was there held that representation was not a principle of Burmese Buddhist Law. The basic rule is that the nearer heir excludes the more remote and the partial representation allowed to grandchildren is merely an exception.

It is to be pointed out that the dominant principle is the non-ascent, and the rule of propinquity is only applied when the application of the principle of non-ascent fails to provide an answer to the question who is the preferential heir (96).

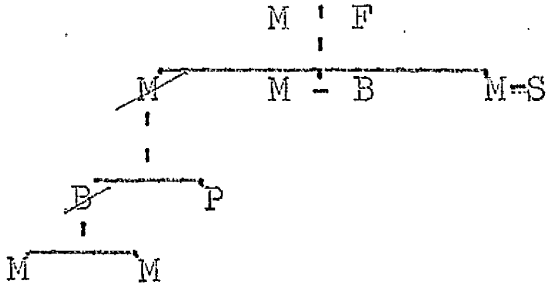
Similarly, the fact that two claimants are equally nearly related to a deceased person is immaterial if the claim of one can be sustained by virtue of the application of the dominant principle, namely that the inheritance shall not ascend if it can descend (97).

In Ma Tin v. Ma Shwe Sint (98), where the children of the deceased brother of the propositus were in competition with the brothers and sisters of the deceased mother, it was held that the children of the deceased brother excluded the uncles and aunts of the propositus i.e. the brothers and sisters of the deceased's mother. In this case the possible claimants are equally nearly related, though at different levels, to the deceased, (that is, uncles and aunts, like the nephews and

---

(95) (1925) 3 Ran. 464.
(96) Ma Tin v. Ma Shwe Sint, (1926) 4 Ran.27(F.B.).
(97) Ibid.
(98) 4 Ran. 27(F.B.).

nieces and three degrees removed from the propositus). But this does not help the uncles and aunts because to reach him the inheritance has to ascend twice, whereas to reach the nephews and nieces it has only to ascend once; the dominant principle of non-ascent excludes the uncles and aunts.

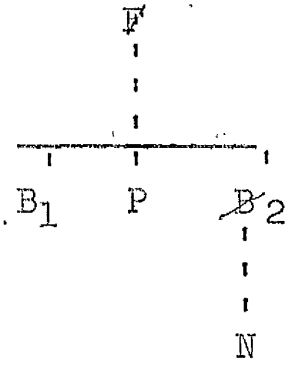


For the purpose of the rule that the nearer excludes the more remote, but not necessarily of the rule of non-ascent, co-heirs of the same degree are irrespective of age, considered each as being equally nearly related to the deceased. Thus, if the third of five brothers dies unmarried, and without leaving descendants, the two elder brothers will be excluded (by virtue of the dominant principle) from inheritance which will devolve in equal shares upon the two younger brothers (99).

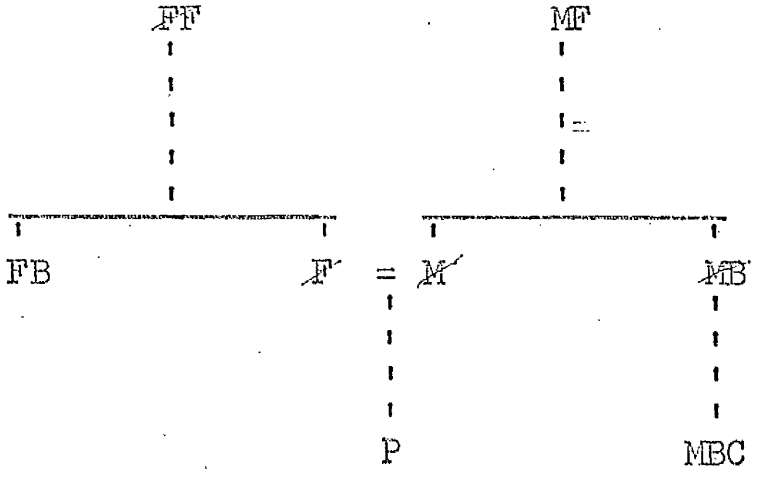
---

(99) O.H.Mootham, Burmese Buddhist Law, 73; Mg.Tu v. Ma Chit, (1926).4 Ran.63.

A surviving brother excludes the children of a previously deceased brother (100).



The father's younger sister and the mother's younger brother are not excluded from the class of six relatives entitled to inherit. An aunt on the father's side excludes the cousins of the deceased on both the father's and the mother's side.



---

(100) Ma Ma Gale v. Ma Me, (1905) 11 U.B.R.B.L. INH.5.

If P dies leaving him surviving his father's brother, and the child of a mother's brother or sister, the application of the principle of non-ascent excludes all but the paternal uncle and the cousin. (In each case there is ascent twice). This principle being exhausted, the rule of proximity is applied. The father's brother being only three degrees removed form P takes in preference to the cousin, who is four degrees removed (101).

7. Exceptions to the Third principle.

(1) Brothers and sisters of a deceased person in competition with the surviving parent or parents of the latter.

Here, different principles seem to contend for the mastery. A father or mother is only one degree removed from the son, while between the latter and his brother or sister there are two degrees. But a parent is an ascendant, and, since ascent of an inheritance is not favoured, a relative on the same level as the deceased appears to have a prior claim. The texts are not unanimous and some avoid giving an unequivocal decision. Hence in the past, the Courts have had "to feel and grope their way with painful slowness and tedious caution (102)".

In Mi Saw Hla Me v. Kya Tun (103) ruled as follows:- "The general rule that property shall not ascend where there are

---

(101) U Pe Gyi v. U Pyo (1925) 3 Ran. 271.
(102) U May Oung, Leading Cases on Buddhist Law, 305.
(103) (1894) P.J. 116.

collateral heirs is subject to exceptions. Where, after separation from his adopted brothers and sisters, an adopted son lives with his adoptive mother, such mother succeeds to his property on his death to the exclusion of his adopted brothers and sisters! Reference was made to Manugye X, 29, under which parents get a share though the deceased has left both a widow and children, while the brothers get none.

In Maung Chit Kywe v. Maung Pyo, (104), wherein the contest was between first cousins of the deceased on the mother's side and the latter's step-father living with her, (but, the property being payin of the deceased's mother, the former were preferred), Burgess J.C., remarked obiter.

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent, the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

In Ma Gun Bon v. Maung Po Kywe (105), the same learned Judge thought if clear "that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents," but this was not necessary for the decision of the case.

---

(104) (1895) II U.B.R. (1892-6) 184.
(105) (1897) II U.B.R. (1897-1901) 66.

A case somewhat similar to that of Mi San Hla Me v. Kya Tun (106) arose in Ma E Dok v. Maung Ngwe Hlaing (107), in which an adoptive mother, with whom the deceased was living at the time of his death, was held entitled to succeed to the property to the exclusion of a first cousin and an uncle; this was based on a finding that parents are entitled to inherit in the absence of direct descendants.

In Maung Shwe Bo v. Maung Pya (108), a paternal aunt sought to oust the maternal grandparents of the propositus. The dictum in Maung Chit Kywe's case was quoted with approval and the 'abundant weight of authority for the preference of parents to brothers and sisters referred to; although the fact that dependants were one degree nearer to the deceased than the plaintiff and the clear provision in Manugye, X, 19 (second part), should have been sufficient to defeat the claim.

In Ma Po Hmon v. Maung Kan (109) the mother of the deceased was preferred to his half-brother and sister. While allowing much weight to the first part of Manugye X, 19, (110) the Court held that it was not precluded from consulting other authorities. Sir Herbert Thirkell White said, "On full consideration I am of opinion that the opinion hitherto accepted

---

(106) (1894) P.J.L.B. 116. (107) (1898) II U.B.R. 109.
(108) (1896) P.J. 524. (109) (1899) 11 U.B.R.(1897-1901)157.
(110) Manugye X,19 says; "Though it is said the property shall not ascend, the law when it shall do so.

Though this is the law, why is it also said, "the father and mother of the deceased have a right to his property?" because if the parents be alive, and the deceased has no other relations, they shall inherit his property, as by way of illustration, the offerings intended to be made to the priests may be offered to God

is correct, and that on the death of a person who leaves no surviving husband, wife or direct descendants, his parents suceed to his estate in preference to all other relatives. The texts are various and conflicting, but so far as they are precise, the weight of authority seems to incline to this conclusion. The rule is that which had already been accepted in this Court and in Lower Burma. It is, moreover, in accordance with natural justice and ordinary rules of devolutions of inheritance."

For about ten years after the last case, the point seems to have been considered settled, until the appeal of Shwe Gon v. Hnin Bwin (111) which came before a Bench of the Chief Court of Lower Burma. The facts were unusual. The appellant had three daughters by his first wife; after her death, he married again and had a second family. For a time they all lived together, the three daughters carrying on business, one (the respondent) on her own account, the other two in partnership; later, however, owing to quarrels between them and the second family, they left the paternal roof, lived together in a house brought by themselves, and continued their business elsewhere.

---

(111) (1910) 5 L.B.R. 231.

None of them married. Subsequently, the two partners died one after the other and left a large estate in the possession of the respondent, whereupon the father sued as sole heir at Buddhist Law. After referring to earlier cases, Mr.Justice Hartnoll said, "The texts in the Dhammathats are conflicting on the point. The texts of the Dhammathats are summarised in sections 296 and 311 of the Digest. I have again fully considered them. I have also considered the position in which Burmese Buddhist parents and children stand with relation to each other. Sections 24, 25, 27, 28 and 97 all go to show what the relation has been, even though some of the rules laid down in those sections would not be followed now. Where the Dhammathats give parents such power over their children it seems to be only natural that where their children have no heirs they should have the first claim to their estate. Again it seems to me that the claim of the first line of collaterals can only come through the parents. It appears to be unnecessary to again discuss the Dhammathats, as they have been discussed in the two more recent cases I have referred to (112). The texts differ; but in my opinion the preponderating weight of authority is in favour of holding that, where the deceased has no direct descendants and leaves no surviving husband or wife the parents should inherit

---

(112) Mg.Shwe Bo v. Mg. Pya, (1896) P.J. 524;
Ma Po Hmon v.Mg. Kan, (1899) II U.B.R.(1897-01) 157.

to the exclusion of all other relatives, and I would hold accordingly." Mr. Justice Parlett, concurring, pointed out further sections illustrating the priority of parents as heirs to a child over their older children at Burmese Buddhist Law. The claim of the father was therefore decreed.

On appeal, however, to the Privy Council, the decree was set aside (113). The Judicial Committee noted as a salient fact in the case that for many years the life of the three ladies "was lived as a life separate from and independent of their father," - and observed, "The need for this fact being pointedly alluded to is that their lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of parents in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas, to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman Law with regard to the scope of the patria potestas. Many illustrations arise in the books but one may suffice. It is mentioned in even the Manukye, the authority of which is the subject of treatment hereafter, than an improverished parent could sell his children into slavery. These observations are, of course, not made to give any colour to the view that rights

---

(113) Ma Hnin Bwin v. U Shwe Gon, (1914) 8 L.B.R.1(P.C.)

to such an extent still remain in modern Burmese Law or practice, but to indicate that the idea of the powers of a parent in this patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life."

Thus, carefully confirming their decision to the case of a family which has "ceased to live together", their Lordships were pleased to accept the Manugye as holding a position of paramount authority, wherever it is not ambiguous, and established beyond doubt in such circumstances the succession of brothers and sisters in preference to parents.

This was due, in part to Richardson's mistranslation of Manugye X, 19.

"Though this is the law, why is it also said 'the father and mother of the deceased have a right to his property', because, if the parents be alive, AND THE DECEASED HAS NO OTHER RELATIONS, they shall inherit his property....."

The official translation of the Manugye text cited in S.311 of volume I of the Digest is "If a person dies leaving neither wife, children, brothers, nor sisters, his parents become his sole heirs". The word which Richardson translated as 'other relations' is ဝမ်းကွဲ meaning 'womb companions' that is in the sense in which it is used in the Dhammathats, 'brothers and sisters.'

In the Courts in Burma the authority of Manugye was, in the British period, paramount, but it is at least doubtful whether the exception is recognised by the Burmese jurists generally. The texts from Dhammavinicchaya, Mahayazawin, and Râjabala cited in the Digest (114) like Manugye seem to support the view that the parents do not inherit in the presence of a spouse, children, brothers or sisters, whereas the texts 'from twelve' other Dhammathats seem to support the view that, in the absence of offspring, the parents take.

There are two texts from Vaṇṇanâ, one to the effect that on the death of a person without descendants his parents inherit, the other to the effect that failing children, the parents or brothers and sisters are entitled to inherit, while the texts from Manuvaṇṇanâ says, (a) "Failing even an apatittha or casually adopted son, the parents or co-heirs are entitled to inherit" and (b) "In the absence of wife or children, the parent inherit." It may be that the authors did not contemplate a case in which parents and children were in competition, but the more likely conclusion is that the authors were in doubt as to whether, after descendants the parents or the brothers and sisters were to be preferred. The majority of the texts in this section seem clearly to regard the parents as the

---

(114) Digest I section 311.

preferential heirs. There are three texts cited from vilasa to the effect that parents inherit in the absence of descendants. There are other texts cited in section 296 giving preference to the parents. The text from Vaṇṇanâ, for instance, runs as follows:- "Failing heirs the estate devolves on the parents of the deceased. In the event of the parents being predeceased, it shall devolve on his or her co-heir" (115).

The position must, therefore, be regarded as doubtful. It seems difficult to argue that the old rule favoured the parents, but was in course of displacement by a new rule favouring the brothers and sisters.

It is at least clear that there is no analogous exception when the grand-parents compete with uncles and aunts. The ascendant relatives higher than the parents invariably exclude those related to the propositus through them and the rule of propinquity is strictly applied (116).

It is worthy of note, however, that the texts relied upon by their lordships of the Privy Council do not differentiate between a family which has ceased to live together and which has not ceased to do so, and the arguments in favour of the brothers and sisters in the one instance would, on the texts, apply to the other. As has been noticed by Twomey C.J., and Robinson,J.,

---

(115) Digest I, section 296.
(116) Manugye X, 19.

in the case of Le Maung v. Ma Kywe (117).

"The principal that inheritance, if possible, should not ascend is of general application and the rule of succession deduced by their lordships from the Dhammathats is wide enough to cover all cases. No actual textual authority has been cited to us, which would warrant special differentiation in favour of parents with whom the deceased child has lived and I doubt if we can differentiate merely by inference from the texts showing the power of parents over their children in former times These texts appear to be more in the nature of moral injunctions and none of them touch the question of inheritance."

Though the learned Judges, refrained from making a definite pronouncement on the point, this being unnecessary to the decision of the case, the difficulty in finding authority for distinguishing between the two cases recognised in Le Maung v. Ma Kywe (118), remains.

In Maung Kun v. Ma Chi (119), the question for decision was the succession to the estate of an unmarried person living with his parents, the contest being between the parents and his brothers and sisters. Page, C.J., said that the only ground upon which it could, with any show of reason, be urged that the

---

(117) (1919) 10 L.B.R. 107.
(118) (1919) 10 L.B.R. 107.
(119) (1931) 9 Ran. 217 (F.B.).

case of Ma Hnin Bwin v. U Shwe Gon (120), did not apply was that given by Twomey,J., in Ma Ein v. Tin Nga (121), in these words:-

"The correctness of this view appears to be confined by the provisions of various texts in the Dhammathats which prescribe schemes for partition between the parents of a person who has died childless on the one hand and the surviving husband or wife on the other (see sections 28, 29, 30 and 31, Manukye, and the cognate texts given in chapter XIX of the Digest). The ordinary rule of inheritance under the Buddhist Law is that the husband is sole heir to the wife and the wife sole heir to the husband, whether there be issue of the marriage of not. The texts cited above show that in certain cases, the surviving parent of a childless son or daughter is allowed to share with the surviving wife or husband, while brothers and sisters do not come in at all. It would seem a fortiori that, when both husband and wife die within a short interval of one another and the estate is treated as the joint estate of both, a surviving parent must be recognised as having a substantial interest in the estate, if indeed he does not altogether oust all other relatives including brothers and sisters of the deceased person, at any rate in cases where the deceased couple lived with the parent."

Page C.J., pointed out (122) that no limitation is set to the generality of the language in Manugye (123). If the author

---

(120) (1914) 8 L.B.R. 1.
(121) (1915) 8 L.B.R. 197 at 200.
(122) Mg.Kun v. Ma Chi, (1931) 9 Ran.217 (F.B.) at 228.
(123) Book X, 19.

had been aware of any qualification of the right of the brother or sister, he would doubtless have expressed it, but there is no reference to the rights of brothers and sisters in Manugye (124) which obviously must refer to cases where there were no brothers or sisters. He then said,

"What difference can there be in principle with respect to the right of succession whether at the time of the death of their unmarried child the deceased and his or her parents happened to be living together? None, in my opinion. In Maung Dwe v. Khoo

---

(124) Book X, 28-32,
Section 28 provides the case for the partition between the son or daughter, son or daughter-in-law, and the father and mother, or father and mother-in-law, when the parents sons, daughters, sons and daughters-in-law, living together a husband or wife dies.
Section 29 provides the case for the partition between the parents and widow of the deceased when parents having given their children a sufficiency, one son, with whom the parents are living, dies without issue.
Section 30 provides the case ~~law~~ for the partition of the property when a daughter and son-in-law living separately in a house of their own, the daughter returns to the house of her parents, and there dies.
Section 31 provides the law for the partition of the property when a daughter dies in the house of her parents, the son-in-law having taken a second wife, goes to her place of residence.
Section 32 provides the law for the partition of the property between the parents of when parents having given their children in marriage and in separate residence, they both shall die.

Haung Shein (125), Lord Dunedin, delivering the judgment of the Judicial committee, observed that "their lordships think it clear that conduct can indeed operate as a disqualification of the right (i.e. of inheritance), but that is in no sense a necessary qualification to obtain the right", and I agree with observations of U May Oung at page 194 of his leading cases on Buddhist Law that "it must be laid down as a general rule that where a claimant was a spouse of, or connected by blood with, the deceased, mere separate living without proof of actual division or of neglect in the performance of family duties, does not affect the right to inherit."

In the result, it was held that the exception to the rule was of universal application.

(ii) Grandchildren and Grandparents.

'Out-of-time' grandchildren are, upon the death of the surviving grandparent, entitled to a special share in the latter's estate (126).

An 'out-of-time' grandchild is one whose father or mother has predeceased his or her own parents or one of them.

Subject to certain exceptions to be considered later, the 'out-of-time' grandchild is entitled, on the death of the propositus to one-quarter of the share in the estate which its parent would have received, had it survived the propositus.

---

(125) (1924) 3 Ran. 29 (P.C.).
(126) O.H. Mootham, Burmese Buddhist Law, 74.

The grandparents, like brothers and sisters, are only two degrees removed, but, as provided in Manugye, X, 19, it is only when there are no parents, children or brothers and sisters that the grandparents can come in. Their rank is therefore after parents and brothers and sisters. There is no reported case on the point, but there is no reason why the rule in Manugye X, 19 should not be followed. There will then be these consequences:-

(1) There is no anology between the case of the brothers and sisters excluding the parents, for clearly the grandparents exclude the uncles and aunts. The ascendant relatives higher than the parents invariably exclude those related to the propositus through them and the rule of propinquity is strictly applied.

(2) The grandparents exclude the descendants of brothers and sisters, which is a breach of the law of non-ascent.

8. Limit of Relationship for Purposes of Inheritance.

It may be noted that in England now, inheritance is limited to descendants from the grandparents of the propositus, and in most European countries except Germany, it is limited to descendants of the grandparents, but in England this only became law in 1925. In India political thought among Englishmen and the desire to avoid the appearance of being acquisitive, combined to avoid the operation of escheat. But today, when the modern state does more for its subjects than what the state did in the nineteenth century, there is no reason why unknown distant

kindred should benefit on the death of a person in preference to the state.

It cannot be said that there is any clear indication in the Dhammathats that a relative however remote would not have a claim to inherit, and the development of the principles referred to already, together with the express recognition of the right of the stranger who gave shelter to the deceased to inherit (127), would suggest that there is no limit.

On the other hand, it might be argued from Digest II, section 10 that relationship ceased with the great-grandfather and great-grandson (128).

9. Succession is never in Abeyance.

At English Law on the death of any person, the executor or administrator intervenes before succession is established. As at Hindu Law, this is not the case at Burmese Buddhist Law. The heirs succeed at once (129).

A child conceived, but not born when the succession opens is entitled to its share of inheritance if it be born alive (130).

10. General Order of Succession amoung Relations.

The estate of a deceased person will, in general terms,

---

(127) Digest 1, 314-317.
(128) Digest 1, section 10, Dhammasâra says, "The seven kinds of relationship are counted three generations in the ascendant and the same number in the descendant line from one-self.
(129) S.C.Lahiri, Burmese Buddhist Law. 149.
(130) Ibid.

devolve upon his heirs in the following order (131):-

First:- The surviving spouse (subject to the share of the orasa, if any).

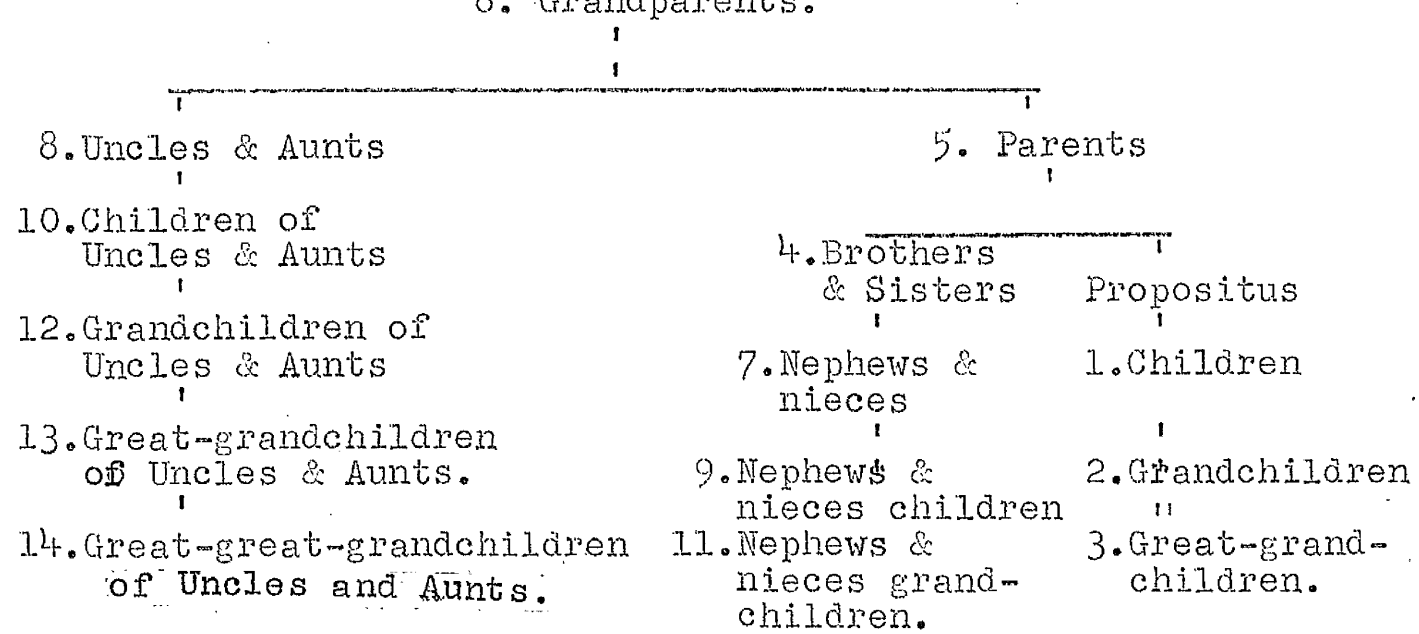
Secondly:- His descendants.

Thirdly:- The first line of collaterals, namely brothers and sisters.

Fourthly:- The parents.

Fifthly:- The second line of collaterals, namely uncles and aunts, and in default upon successive ascending lines of collaterals.

The table hereunder may, perhaps help to explain the general order of succession as numerically indicated, where a Burman Buddhist dies, leaving no surviving spouse (132).



(131) O.H.Mootham, Burmese Buddhist Law, 75.
(132) S.C.Lahiri, Burmese Buddhist Law, 149.

CHAPTER.XIII

INHERITANCE II. REMOTER HEIRS.

(1) Adopted children.

The Burmese words "Mwe-sa-de" do not clearly give the idea of adoption as one's own child as the English word 'adoption' does. In Burmese Buddhist Law there is a distinction between adoption with a view to inherit and adoption out of pity. In the words of the Dhammathats a son of the former type is known as "kaung-mwegan-so-mwegan-mwe-sa-thaw tha" while a son of the latter type is known as "kauk-yu-mwe-sa-thaw-tha" (1). As regards the law of adoption the Burmese Buddhist Law differs widely from the Hindu Law. (2).

There are three recognised kinds of adoptions amongst Burman Buddhists now. In pre-British days there was another kind known as sahodda. The three recognised kinds are:-

Kittima, apatittha, and chata-bhatta.

The word kittima comes from the Sanskrit word krittima or Pali word kittima which means fictitious (3). Kittima is the highest form of adoption of a son or daughter with the intention that the child shall inherit to the adoptive parents and the adoption must be performed in full consciousness of what is being done. There must be, on the one hand, the consent of the

---

(1) Shwe Kin v. Maung Sin, (1920) 10 L.B.R. 376.
(2) S.C. Lahiri, Burmese Buddhist Law, 109.
(3) S.C. Lahiri, Burmese Buddhist Law, 112.

natural parents or relations of the child to give it in adoption with the understanding that the child shall thenceforth belong to the new family and, on the other hand, the taking of the child by the adoptive parents with the intention that the child shall inherit in the new family (4).

The word apatittha comes from the Sanskrit word apabiddha or Pali word apabidda which means rejected (5). The apatittha has been described as "the child who is taken casually, cared for and reared with the intention 'we will make it a child of ours,' - its parents may not be aware of it or may not be existing, it may not have relatives or they may not be ascertainable, or the parents or relatives may be existing and know of the adoption (6). Such a child has in Tet Tun v. Ma Chein (7) been described as "a foundling, a child casually adopted whether its parents are known or not, a child casually adopted and brought up in the family of the adoptive parents, being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted." Stress was laid in this case, as also in the later case of Shwe Kin v. Maung Sin, (8),on the campassionate nature of the adoption. But in Ma Than Nyun v. Daw Shwe Thet, (9), it was

---

(4) Manugye Book 10, section 27; Digest Vol.1,section 16.
(5) S.C.Lahiri, Burmese Buddhist Law, 113.
(6) U May Oung, Leading cases on Buddhist Law, 135.
(7) (1910) 5. L.B.R. 216.
(8) (1920) 10 L.B.R.376. (9) (1936) 14 Ran.551. See also Ko Pe Kyai v. Ma Thein Kha,(1937) Ran.426; Ma Sint v. Ma Ma Gale,(1939) Ran.~~L.R.~~378; Mg.Ba Thi Nyo v. Mg.San Nyun, (1948) Ran.710; O.H. Mootham, Burmese Buddhist,Law,51.

pointed out by Ba U,J. - that "an intention either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit forms the dividing ~~line~~ Line between a kittima child and an apatittha child. In other respects the position of an apatittha child is the same as that of a kittima child;" and Mosley, J., stated, "As May Oung points out in his Buddhist Law (10) the 'foundling' is the chatabhatta not the apatittha."

The chata-bhatta is the compassionate adoption of a son or daughter. The chata-bhatta child is a foundling, a destitute and hunger stricken child who has been adopted through compassion. The child is never brought up as a child of the family (11).

The sahodda is the adoption of a son or daughter by purchase. Such adoptions are not allowed now (12).

The chatabhatta and the sahoddha come within the six classes of sons, described in the Dhammathats, as not entitled to inherit (13). According to Lahiri, the chata-bhatta child is entitled to inherit the estate of his or her adoptive parents in the absence of any natural, kittima, or apatittha

---

(10) Leading cases on Buddhist Law, 135.
(11) S.C.Lahiri, Burmese Buddhist Law,113.
U May Oung, Leading cases on Buddhist Law,123.
Attahsankhepa, section 51.
(12) S.C.Lahiri, Burmese Buddhist Law,113.
(13) Ma Tin Shwe v. Mg.Kan Giyi,(1889) II U.B.R,where the position of a sahoddha child was briefly considered.

child or their descendants, or any relation of the adoptive parents, but he gives no authority for this view (14).

A kittima child ceases upon adoption to be a member of his original family, and becomes in lieu thereof a member of the family of his adoptive parents. He ceases to have any claim to a share in the estate of his original family (15) out of which it is said he,

"drops even more completely than a deceased child--for the deceased may leave children of his own who are admitted to a certain share which does not seem to be the case with the children of an adoptee" (16).

The adopted child must, however, perform the same filial duties as a natural and lawful child, and if he fails to do so, he may forfeit his rights of inheritance (17).

According to the Dhammathats, the kittima child's position is inferior to that of the natural children (18). The texts cited in section 191 of the Digest 1, show this clearly; that from the Mano is typical:-

The parents die while the orass (19) and kittima sons are

---

(14) U.E.Maung, Burmese Buddhist Law,210; Digest 1. 17; S.C.Lahiri,Burmese Buddhist Law,135.
(15) Mg.Pan v. Ma Hnyi, (1897) II U.B.R. (1897-1901) 104.
(16) Mg.Pan v. Ma Hnyi, (1897) II U.B.R. (1897-1901) 104 at 105.
(17) Mg.Aing v.Ma Kin, (1893) II U.B.R. (1892-6) 22.
(18) U May Oung, Leading cases on Buddhist Law,154; Mg.Mya Mg. v. Ma Mya Sein,(1936)A.I.R.Ran.518. Ma Khin Kyi v. Ma Than Tin,(1950) B.L.R.59.
(19) This expression in this particular context means the son born in wedlock, as it does in Hindu Law; see U May Oung, Leading cases on Buddhist Law,154.

living with them. The orasa son shall then receive five shares and the kittima son one share. Because, if the parents are reduced to poverty, the kittima son also takes the consequences. This rule applies when there are only two sons, one natural and the other adopted. If there are many sons the shares should be correspondingly multiplied.

The matter received more detailed treatment in section 189 of Kinwun Mingyi's Digest, volume I, which includes an extract from the Manugye, Book X, section 26:-

The statement that, on the death of the adoptive parents, the kittima son, who lived with them, shall receive the eldest son's share if he is the eldest, the intermediate son's share if he is the intermediate, or the youngest son's share if he is the youngest, means that he shall receive a share equal to that of the eldest or of the intermediate or of the youngest son of the adoptive parents according as he falls into one or other of those classes. Why is this? Because the kittima child loses the right to inherit the property of his or her natural parents.

This, however, is not free from obscurity, and reference should therefore be made to the corresponding section in the Attasankhepa (20):-

"The law of partition between the orasa and kittima sons living with the parents.

Let the property be divided into six shares, and let the

---

(20) Section 176.

orasa living with the parents take five shares, and the kittima son living with parents one share. The orasa son stands in either of the four kinds of relationship to the kittima, namely, he may be the eldest, older, younger or youngest child of the family. If the orasa son is the eldest, let the kittima take one-sixth of the property, if he is the elder, let the kittima take one-fifth, if the younger, let the kittima take one-fourth, if the youngest, let these be an equal division between the two."

The Dâyajja extract in the Digest is in accord with this (21). But since, distribution of the parental estate on a graduated scale among brothers and sisters born in wedlock has been discarded by the Courts in Burma in favour of equal shares per capita (22), a kittima child is now in the same position as a child born in wedlock, and the foregoing texts are useful only so far as the question of orasaship, in the sense in which this expression is usually used in Burmese Law, i.e. the child born in wedlock and enjoying preferential rights of inheritance, is concerned (23).

The extent of the right of inheritance of a kittima child in the estate of his adoptive parents has been the subject of several decisions, and the undertainty which prevailed previously in this branch of the law has been almost, if not entirely, removed (24).

---

(21) Digest I, Section 189.
(22) Ma Kyi Kyi v. Ma Thein, (1905) 3 L.B.R. 8.
(23) U May Oung, Leading cases on Buddhist Law, 155.
(24) O.H. Mootham, Burmese Buddhist Law, 60.

In Maung Thwe's case (25) the Privy Council said, "A child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a kittima tha or kittima child."

The subject matter of the appeal before the Board in that case was whether the appellant and respondent, or either of them, had established his status as a kittima child, and consequently the statement of law quoted above was not necessary for the decision of the appeal. In the year 1926, a full bench of the Rangoon High Court, in the case of Maung Po An v. Ma Dwe (26), placed a limitation on the kittima child's rights of inheritance by holding that such a person was not entitled to claim, on the death of his adoptive mother, the special quarter share in the estate to which a son born in wedlock, who had acquired the status of orasa (27) would have been entitled. This decision was arrived at after an examination of the relevant texts and earlier authorities, save that Maung Thwe's case (27) appears not to have been cited. The limitation placed upon the general rule by the High Court was approved by the Privy Council in Maung Sein Shwe v. Maung Sein Gyi (28).

---

(25) (1917) 44I. A. 251.
(26) (1926) 4 Ran. 184 (F.B.).
(27) (1917) 44I. A. 251.
(28) (1934) 13 Ran. 69. See also Mg.Thein v. Tha Byaw, (1939) R.a.n.R. 394 (F.B.).

In Ma Thein v. Ma Mya (29) the general principle was affirmed and it was held that a kittima child can, on the re-marriage of one parent after the death of the other, exercise the rights of a natural born child and sue for partition. In the early case of Maung Aing v. Ma Kin (30) it was held that a kittima child was only entitled to a half share (as against the whole to which son born in wedlock would have been entitled) in ancestral property which had not come into the possession of the child's adoptive parents prior to their death. In Maung Thein v. U Tha Byaw, (31), it was held that kittima adoption creates not only heirship of the adoption to the adoptor but also the relationship of a parent and child and by virtue of such relationship the adoptee acquires the rights of a child born in wedlock to the adoptor in the estates of the adoptor's collaterals and ascendants.

It may be said in the words of Sir Lancelot Sanderson (32), "It must now be taken that apart from the question relating to any rights of an eldest child, the kittima adopted sons are entitled to share equally with the natural sons of the adoptor."

---

(29) (1929) 7 Ran. 193.
(30) (1893) II U.B.R. (1892-6) 22.
(31) (1939) Rgn. L.R. 341 (F.B.)
(32) Mg.Sein Shwe v. Mg.Sein Gyi, (1934) Ran.69 at 81 (P.C.).

An apatittha adopted child is a person not without rights. He is one of the six classes of children entitled to inherit the estate of the parents. Where there are natural or kittima children, an apatittha child is not entitled to share in the estate of the adoptive parents (33). Even in the absence of natural and kittima children, an apatittha child is entitled to only one half of the estate of the adoptive parent, the other relatives of the adoptive parent being entitled to the other half (34), but this right is lost if the apatittha child lives apart from his or her adoptive parents (35). The status of an apatittha child cannot by any means be higher than that of a kilitha son (36). Though the Dhammathats are silent as regards the rights of an apatittha child as against a kilitha child (37), it seems reasonably clear from the fact that the kilitha child excludes collaterals of the deceased parent, that a kilitha child will exclude an apatittha child,(38).

---

(33) Mg. Tin Aye v. Mg.Mg.Hmin,(1950) B.L.R.78 (S.C.) at 84.
(34) Mg.Mya Mg. v. Ma Mya Sein,(1936) A.I.R. Ran 518.
(35) Mg.Gyi v. Mg.Aung Pyo,(1924)II Ran 661. Ma Than Nyun v. Daw Shwe Tit,(1936)14 Ran. 557; Ma Khin Kyi v. Ma Than Tin, (1950) B.L.R. 59.
(36) Ma Sint v. Ma Ma Gale,(1939) Rgn.L.R.378; Ma Khin Kyi v. Ma Than Tin (1950) B.L.R.59; See Mg.Tin Aye v. Mg.Mg.Hmin (1950) B.L.R.78 at 84 (S.C.)where U.E.Mg.J. said, "There are certain decisions of the High Court of Judicature which suggest that an apatittha child would be in a position inferior to that of a kilitha child even. But it is not necessary in this case to say whether we agree with those decisions in that respect."
(37) i.e. a casually begotten child and see as regards his rights infra.
(38) U.E.Maung, Burmese Buddhist Law, 225; Ma Khin Kyi v. Ma Than Tin (1950) B.L.R.59.

An adopted child's right of inheritance is not indefeasible, and if the adoptive parent dies professing the Christian faith the adopted child cannot claim to inherit on intestacy as if he or she were a natural child (39).

2. Illegitimate Children.

An illegitimate child is ordinarily not entitled to inherit (40).

The kilitha child has been described in the Dhammathats (41) either as, a child "begotten while in pursuit of amoruos pleasure" or "a child, male or female, begotten by man and woman in pleasure by mutual consent but who do not live openly together." Such a child is not illegitimate child; he is not without rights of succession in the parental estate; but his rights are inferior to those of children born of parents "who live openly together," Hence in Ma Hnya v. Ma On Bwin (42), the term 'casually begotten child' was suggested as more accurately descriptive of the kilitha child.

It being a principle of Burmese Buddhist Law that in the absence of children with superior rights of inheritance, the "inferior" children will take the estate of the parent (43),

---

(39) Ma Khin Than v. Ma Ahma,(1934) 12 Ran.184. This case was one of adoption in the kittima form, but the same result would clearly follow in the case of an apatittha adoption; see also O.H.Mootham, Burmese Buddhist Law,61.
(40) Nga Ka Yin O v. Ma Gyi,(1873) S.J.15; Ma Le v. Ma Pauk Pin, (1883) S.J.225; Ma Sein Hla v. Mg.Sein Hnan,(1903) 2 L.B.R. 54.
(41) Digest, 1, 17.
(42) Ma Hnya v. Ma On Bwin, (1915) 9 L.B.R. 1 (F.B.).
(43) Manugye, Book X, section 51.

it was held in Nga Ka Yin O v. Ma Gyi (44) that the kilitha child inherits in the absence of a child of a regualr union. In this case the father left a widow, but no objection was raised to the kilitha's claim on this ground and the effect of the presence of the widow was not considered.

In Ma Le v. Ma Pauk Pin (45) the deceased left legitimate children and it was held that his daughter by a damsel (Kanina) not recognised as a concubine could not share in his property.

In Maung Pyu v. Ma Chit (46) it was ruled that illegitimate grandchildren are excluded from inheritance to their grandparents when the latter have left legitimate children surviving them. The first question was whether the plaintiff's father could form a legitimate union with her mother without the consent of her father's parents, the couple having eloped without the approval of their parents and subsequently lived together as man and wife; the second question was whether the plaintiff (Ma Chit), an illegitimate granddaughter, was entitled to represent her deceased father and take his share in the estate of the grandparents.

Burgess, J.C., observed:-

"At the end of chapter X of Manugye there is a provision that on failure of good or legitimate children the bad or illegitimate are to obtain the inheritance and it is admitted that as plaintiff is the only child of Maung Pyu she would be entitled to any property belonging to him. But it is contended

---

(44) (1873) S.J. 15. (45) (1883) S.J.L.B. 225.
(46) (1893) II U.B.R. (1892-6) 141.

that this provision does not apply to the estate of the grandparents. There is no need to allow an illegitimate child to succeed to that, for there are already legitimate heirs, so that the illegitimate grandchild is excluded. A child like the plaintiff is shut out by the general rule. She would come among the six classes of children not entitled to inherit, and in the list of twelve of which the auratha only is said to have a perfect right to the property of the parents, pages 314, 315, 319, Manugye 3rd edition".

Reference was made to section 50, 51, and 73, Book X, Manugye. Section 50 makes a distinction between the children of a run-away couple who have eloped together without the consent of their parents and those born after the consent has been given. Section 51 refers to the case of "a child begotten in youthful wantonness without marriage," and the 73rd section provides for the case of a man and woman eloping, without informing their parents, the woman dying, and the man returning with the children and a female slave whom the parents gave him in marriage. Even the children of the slave are given a share with those of the deceased woman in the property jointly acquired by her and the father because the former are children born in wedlock.

Under Buddhist Law the only out-of-time grandchild who can claim a share on the death of one grandparent is the eldest child of the deceased orasa son. Accordingly if the plaintiff was not an illegitimate grandchild, she would be entitled to

take the share of her father, the orasa son, who predeceased her grandmother in whose estate she claims to inherit a share as against the latter's sons, her uncles. But as she was born out of wedlock, she was excluded from the inheritance by her surviving uncles.

The case is governed by sections 51, Book X, Manugye; and its cognate sections of the Digest (sections 300 and 313). The plaintiff's father having eloped with her mother the union of her parents (without the consent of their parents) was in the eye of the law not a marriage, and her position was not altered by the union, which was imperfect in its inception, subsequently becoming a marriage by the public living together of her parents as man and wife. There is no exception to the general rule which confines the right of inheritance in the ancestial undivided property to the offspring of legal union, i.e. marriages sanctioned by parental consent. This being so, the plaintiff could not claim a share in her grandparents' estate when the latter left legitimate children surviving them.

As pointed out by the learned Judicial Commissioner in Maung Pyu's case the object of the special exception made it the case of an illegitimate child, not in competition with legitimate offspring, is to prevent the inheritance from ascending or the succession from failing altogether, so that there would be no reason for admitting a casually begotten child when there is a regular heir as in this instance (47).

---

(47) (1893) II U.B.R. (1892-6) 141.

In 1915, an attempt was made to clarify the law when Fox, C.J., referred to a full Bench (48) the following questions:-

(1) A Burmese Buddhist man dies leaving a widow and an illegitimate child. Is the illegitimate child entitled to any share in the estate left by the man? If so, to what share, if the child is a daughter?

(2) In the above case, can an illegitimate daughter, if entitled to a share in her deceased father's estate, claim and obtain such share in the lifetime of her father's widow?

The four Judges constituting the Bench were not, however, unanimous in their answers. The Cheif Justice answered both questions in the negative. Twomey,J., held that an illegitimate child cannot share with his or her father's widow in the father's estate. Ormond,J.,agreed with the view of Mr. Justice Twomey, subject to the qualification that the parents of the child did not live openly as man and wife, White Parlett,J., answered both questions in the affirmative. The majority of the Court therefore held that an illegitimate (kilitha) child cannot share with the widow in his or her father's estate. But Parlett,J., the dissentient Judge, answered both questions in the affirmative, and held that the daughter is entitled to three-quarters of her father's payin or separate property and

---

(48) Ma Hnya v. Ma On Bwin, (1915) 9 L.B.R. 1 (F.B.).

to one - sixth of the jointly acquired property of the father and the widow.

Parlett, J., in support of his view cited section 81, Book X, Manugye and its cognate sections (220 and 231) of the Digest, but the texts are not directly in point. They deal with partition between an illegitimate son and his step-father when they lived together and the rule is that when there is no legitimate offspring, the illegitimate child is entitled to three quarters of its deceased mother's separate property and one-eighth or one-sixth of the property jointly acquired by the mother and step-father.

In both sections the expression used in the original Burmese is "maya pa tha," that is, the son brought by the wife to the marriage. He is incorrectly described in the translation of the Digest as 'a bastard son born before marriage'. What the original text distinctly implies is that the son born out of wedlock must enter the new family with the mother and thus "become one of the family". But neither section makes any mention of a partition between a bastard child and its step-mother and the question is whether the same rule applies in that case. A text of Manugye is quoted in both sections 220 and 231. The extracts given there are from section 81, Boox X, commented on at length by the learned dissentient Judge.

Fox, C.J., and Twomey,J., in answering both questions in the negative, held that even assuming that a kilitha child can

claim a share of his or her mother's property from her surviving husband, it does not follow that the same principle should apply in the converse case, when the father brings an illegitimate child to the marriage. It was contended that if the anology of a step-child were applied, the second question referred should be answered in the affirmative. In reply to this contention the learned Chief Judge said:-

"Application for the analogy would mean putting the indignity upon the widow of having to recognise as a stepchild and share with her in her husband's estate the child of a woman whose association with her husband had been devoid of what is at the root of the idea of marriage amongst Burmese as well as other races, namely, the continous living together of a man and woman as mutual helpmates. The widow have to recognize a woman as her husband's wife who had in fact never been his wife, and who had no enforceable claim on him on her own account."

Twomey,J., remarked that even if a kilitha is entitled to a share in his or her mother's property, if she dies leaving a husband, there is not an inkling in any of the Dhammathats that such a rule is applicable to the case of a father who leaves a kilitha child and a widow, so that it must be assumed that the distinction between the two cases was intentional. He then remarked:-

"I think we should not be justified in applying the rule

for mother and child by analogy but should regard the silence of the Dhammathats as negativing any claim by a casually begotten child against his father's widow."

The reason for the distinction between the case of a mother and that of a father, the learned Judge pointed out, "probably lies in the difficulty of solving questions of disputed paternity. There is never any doubt as to a child's mother, but in the case of a casually begotten child the paternity is often very doubtful and it would give to much litigation and confusion and would make the position of a widow intolerable if she were liable to claims of persons setting themselves up as casually begotten children of her late husband."

Ormond,J., who concurred in the views of the learned colleagues said that the general rule is that a kilitha child is not entitled to inherit and pointed out the exceptions to that rule as follows (49):-

"A kilitha child can in certain circumstances inherit the property of his parents which is in their actual possession. He cannot inherit from the parents or relations of his parents and he has no right to his parents' undivided share of inherited property. Even if his parents subsequently become man and wife, his position is not altered. His right of inheritance is barred if his parent leaves a wife (or husband) or legitimate descendants. If his father dies when living with his parents, the child's right to inherit from his father is barred. If his

---

(49) Ma Hnya v. Ma On Bwin,(1915)9 L.B.R.1.(F.B).at 5-6.

father dies when living with other relations, those relations, take half," the child taking the other half of the deceased's separate property (sections 51-53, Book X, Manugye)."

The learned Judge remarked that even a child of a couple regularly given in marriage by their parents but who separate after the child is begotten, cannot inherit from its father who leaves a wife, child or grandchild (section 55, Book X, Manugye and section 299 Digest Vol.I), though the status of such a child is higher than that of a kilitha, and there is much force in this reasoning. To the same effect is the rule laid down in sections 297-298 of the Digest. It was also noticed that section 53 which refers to the case of the father living with his parents and other relations makes the joint living of the child and its father's relations an essential condition of the child's right to inherit. This passage is quoted in section 300 of the Digest, volume I.

The latter part of section 81, Book, X, Manugye referred to in that case is extracted in section 254 of the Digest which seems to have escaped notice. The translation of the second extract as given there is as follows:-

"The general rule that in case of partition on the death of the parent and step-parent between children of the previous marriage and those of the later, the former shall receive two-thirds of the property of the former marriage, and one-third of that of the later marriage, and the later one-third and two-thirds respectively of the two classes of property, applies

only in cases of children born in lawful wedlock. It does not apply to bastard children. In the absence of children of lawful marriage, a bastard may inherit his or her parent's separate property and that acquired jointly by his mother and step-father, or father and step-mother; and he or she will also be liable for the debts if there are any. (Even) if a bastard's mother has no children born in lawful wedlock, the bastard shall not claim his or her mother's share of inheritance from her co-heirs, no matter whether she is alive or not."

The Manugye passage just cited is extremely hard to construe and from the later part of the extract it would appear at first sight that in the absence of legitimate offspring a kilitha child has a right to claim from the step-father or step-mother a share of the mother's or father's separate property and of the property jointly acquired by the parent and the step-parent. But as regards the ancestral undivided property there is no exception to the general rule which confines the right of inheritance in such property to the offspring of legal unions, that is, those sanctioned by parental consent. It is, however, clear from the other Dhammathats extracted in section 254 that the texts including the Manugye text (1st extract) contemplates the division of property between bastard children and those born in wedlock on the death of their common parent (mother or father). The section, moreover, is headed: "Partition between bastard children is and those born in wedlock." It is also equally clear from the

other Manugye passages quoted above as reproduced in the Digest (sections 220 and 231) which relate to partition between a bastard and his step-father that the living with the mother and step-father is an essential condition so as to indicate that the couple has openly acknowledged the relationship and that the child by living with him is regarded as and has become "one of the family."

But no equally clear rules are laid down with respect to the converse case where it is the father who brings a kilitha child to the marriage, as there is no section either in Manugye or the Digest which treats of partition between the child and the step-mother, the father's widow, though on account of the general tendency of the Burmese Law to treat the sexes equally, it might be argued that the same principle should apply in that case also.

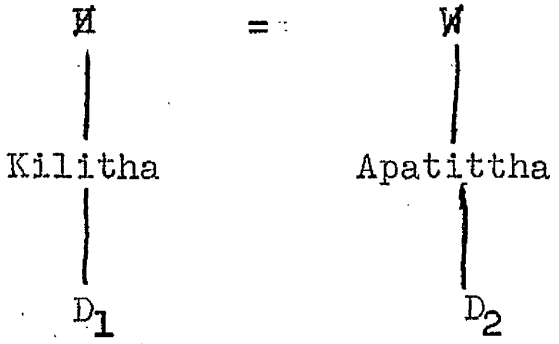
On this point Parlett,J., observed (50), "There appears to be no rule, and I can see no strong reason for holding, that an illegitimate child whose father is known and has openly acknowledged ~~the~~ the relationship should be in a worse position, nor for holding that the same principle should not apply in the converse case, where the parent who married is the father and not the mother of the illegitimate child. That principle appears to be to give to the step-child, though illegitimate, a right of partition against the surviving step-parent when there are no legitimate children. In this case there are none."

---

(50) Ma Hnya v. Ma On Bwin, (1915) 9 L.B.R.1(F.B.) at 18.

This decision overruled Ma Sein Hla v. Maung Sein Hnan (51) where an illegitimate child was, in the absence of legitimate children, held to be entitled to inherit his father's widow's estate to the exclusion of the widow's cousin on the ground that (i) in the absence of legitimate children, illegitimate children inherit to the exclusion of collaterals, (ii) that an illegitimate child in such circumstances is in the position of a step-child, and (iii) that step-children excludes collaterals.

In Ma Khin Kyi v. Ma Than Tin,(52), it was held that a kilitha child would inherit the estate of his deceased parent to the exclusion of collaterals, but cannot inherit in competition with the widow; a kilitha child would also exclude an apatittha child. In this case a Burmese Buddhist husband had a kilitha daughter the fruit of an irregular union with a woman who abandoned the child. The daughter was then brought up by the husband and his wife and was given in marriage by the wife after the death of the husband.



(51) (1903) 2 L.B.R. 54.
(52) (1949) B.L.R. 273; Followed U E Maung, Burmese Buddhist Law, 225 and 264.

She died leaving a daughter. The couple had no legal issue but the wife adopted a child in apatittha form. Both the child of the kilitha daughter of the husband and apatittha daughter of the wife claimed the estate. The trial court, relying on Ma Sein Hla's case (53), held that the child of an illegitimate could not compete with the child of an apatittha. It was held by the High Court that the right of the kilitha to exclude the collateral is restricted to the case where the father, without compensating the mother and severing his connection with her and the child thereby, has taken the child and brought it up in his own house. Section 53 of the Manugye refers to the case where the mother has been paid off. Aung Tha Gyaw J., observed (54):-

"Thus on the principle laid down in the Dhammathats a case might possibly be found for the postponement of the apatittha claim to that of the kilitha child in the property of their deceased parent. In this case, however, the contending claims have been made not to the estate of the deceased parent but to the estate of the deceased step-grand-parent and in view of the fact that both the child born of the kilitha daughter and the daughter born of the apatittha son had been brought up together in the household of the step-grandparent circumstances

---

(53) (1903) 2 L.B.R.54.
(54) (1949) B.L.R. 273 at 277.

which do not fit in with the contingencies met with in the case law or provided for in the Dhammathats, the rule of justice, equity and good conscience followed by the lower appellate court would appear to commend itself as the best means of arriving at a just decision in this case." "It was held that though a kilitha child might exclude an apatittha child's right to inherit to the estate of the deceased parent, in the instant case, the claim of the child of the apatittha son was at least equal to that of the child of the kilitha son in the estate of the step-grandmother, and the decision of the District Court giving each half-share is according to justice, equity and good conscience, and should be upheld.

It may be asked whether this decision is correct. A kilitha child's daughter cannot claim by representation. If part of the father's estate had vested in the kilitha's child before her death, her child would inherit, but Aung Thaw Gyaw J., held that a kilitha cannot inherit in competition with the widow.

On further appeal under section 20 of the Union Judiciary Act, 1948, the decision of Aung Tha Gyaw J., was confirmed by U Thein Maung C.J., (55).

It was held in Maung Pyu v. Ma Chit (56), that imperfection of birth is not cured by subsequent regular union of the parents.

---

(55) (1950) B.L.R. 55.
(56) (1893) II U.B.R. (1892-6) 141.

3. Inferior Wives.

The Buddhist Law contemplates the existence of women of humbler standing differentiated from wives proper or "superior wives", whom are described as "inferior wives". An inferior wife, if living together with the husband, is entitled to two-fifths and the superior wife to three-fifths of the husband's estate, but where the inferior wife is living apart from the husband and is only occassionally visited by him, she is entitled to nothing more that the property which had passed to her possession during the life-time of the husband (57). The decision of the High Court in the case of Ma Thein Yin v. Maung Tha Dun (58) does not revolutionize Burmese Buddhist Law in respect of the rights of a lesser or inferior wife living apart from her husband, but merely confirm what has been held in a line of cases extending over thirty years in the Courts of Burma; it is consistent with the law stated in Manugye (59), and is regarded as settled law (60).

Hence, once the status of an inferior wife is established, her right to share her husband's estate will be determined according as to whether or not she had lived with him during his lifetime (61).

---

(57) Ma Thein Yin v. Mg.Tha Dun, (1923) 2 Ran.62.
(58) Ibid.
(59) Manugye X., 42.
(60) Ma Than v. Ma Kyin, (1925) 3 Ran.656.
(61) Ma Gywe v. Ma Thi Da,(1891) II U.B.R.(1892-6) 194;
Ma Thein Yin v. Mg.Tha Dun, (1923) 2 Ran. 62.

An inferior wife's son ranks as a legitimate child, and it has been held that where the inferior wife predeceases her husband the son is, upon the latter's death, entitled to his mother's two-fifths share (62).

4. 'Out of time' Grandchildren.

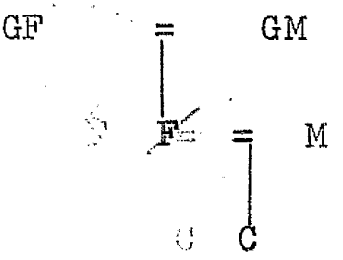
(a) The right to inherit.

In Burmese Buddhist Law grandchildren are of two kinds namely "in-time" grandchildren and "out-of-time" grandchildren. Natural children's kittima children and kittima children's natural children are treated exactly like natural grandchildren for the purpose of inheritance (63).

In-time grandchildren are those grandchildren whose parent die after their grandparents.

An "out-of-time" grandchild is one whose father or mother has predeceased his or her own parents or one of them (64), and can inherit as such.

If, as indicated in the diagram,



(62) Ma Shwe Ma v. Ma Hlaing, (1893) II U.B.R.(1892-6) 145.
(63) S.C.Lahiri, Burmese Buddhist Law, 209.
(64) Po Hman v. Mg.Tin, (1915) 8 L.B.R.113:
Mg.Sein Shwe v. Mg.Sein Gyi, (1934) 13 Ran.69 (P.C.).

C is the issue of M's marriage with F who is the child of GF and GM, then C will be the 'out-of-time' grandchild of GF and GM (or of the survivor) if F predeceases either GF or GM.

'Out-of-time' grandchildren inherit in their own rights (65); they do not, and cannot, derive their right of inheritance through the deceased parent for the latter, having died before his own parents, could acquire no interest in their estate capable of transmission to his heirs. In the phrase used in the Dhammathats he was not 'in reach' of the inheritance at the time of his death. On the other hand, if the parent had survived the grandparents he would have acquired a vested interest in their estate which, on his death, would pass to his heirs in the ordinary way.

(b) Grandchildren inter se.

"Out-of-time" grandchildren succeed to the estate of their surviving grandparent, as the next of kin, if on the latter's death there are no children living.

Such grandchildren succeed as the next class of descendants after sons and daughters. Where the grandchildren are descended from the same grandparents the division between them will be per capita, irrespective of whether they are related to each other as brothers and sisters (66), or as cousins (67.

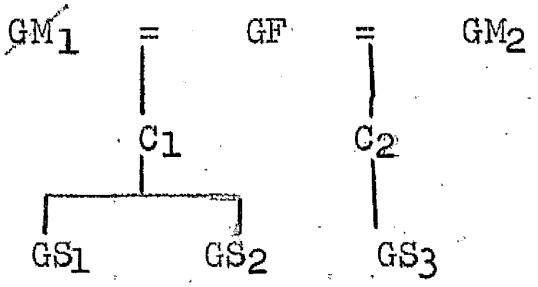
---

(65) U Sein v. Ma Bok, (1933) II Ran. 158.
(66) Ma Thi v. Ma Nu, (1875) S.J. 70;
(Chan Tha v. Mi Ma Byu, (1914) 9 B.L.T. 95.
(67) Mg. Ye v. Ma Me, (1898) P.J. 418;
Mg. Po Thu Daw v. Mg. Po Than, (1923) I Ran.316(F.B.) at 331.

The Dhammathats lay down no clear rule as to the shares of grandchildren among themselves, and the rule of equal division is based, as in the case of the shares of children, on the ground that where several heirs stand in the same degree of relationship to the proposities there is no equitable reason why one should be favoured to the disadvantage of the others. Like equity it has been said, Burmese Buddhist Law "delighted in equality" (68), although (as will be seen) the principle of equality plays little part in determining the share to which grandchildren are entitled when in competition with step-relations.

Where however, the heirs are grandchildren descended from different marriages of the common grandparent, a different rule as to shares would seem to apply. The point does not appear to have come yet before the Courts for decision, but the rule in such a case is, it is submitted, that each grandchild or set of grandchildren, as the case may be, takes the share which his or their parent would have taken had he or they survived the grandparents.

Thus,



(68) Mg.Po Thu Daw v. Mg.Po Than, (1923)I Ran.316(F.B.) at 331.

if GF is the common grandfather who married, first, GM_1 by whom he had a child C_1, and, after her death, GM_2, by whom he had a child C_2, it is submitted that in the hnapazon of the marriage of GF and GM_2, the share of GS_3 the child of C_2 will be twice the share of GS_1 and GS_2, the children of C_1, ~~and so~~ so that GS_3 will take two-thirds and GS_1 and GS_2 will each take one-sixth (69).

(C) Grandchildren incompetition with uncles and aunts.

The general rule is that an 'out-of-time' grandchild, when in competion with uncles and aunts, is entitled to one-quarter of the share in the grandparents' estate to which his parent would have been entitled had he survived (70).

When, however, an 'out-of-time' grandchild is the child of the eldest child of the grandparent he is entitled, in the same circumstance, to share equally with his uncles and aunts (71).

A child who had died before attaining majority is disregarded for the purpose of ascertaining the eldest child (72), and an uncle or aunt who has pre-deceased the grandparent without leaving issue is disregarded in computing the share to which the

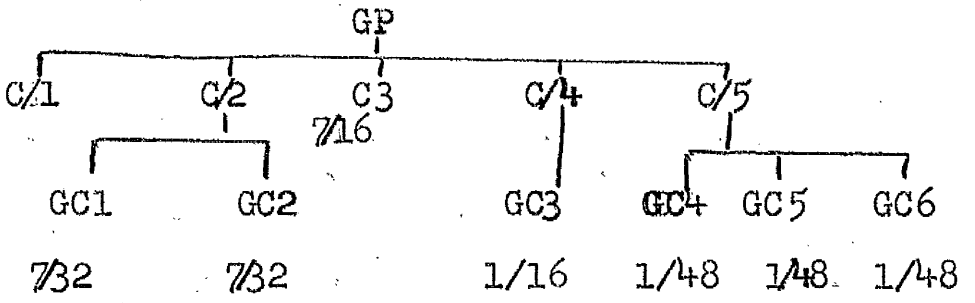
---

(69) See Ma Nan Shwe v. Ma Sein, (1924) 2 Ran. 514.
(70) Mg.Sein Shwe v. Mg.Sein Gyi,(1934)13 Ran.69 (P.C.);
Mg.Shwe Ye v. Mg.Po Mya,(1925) 3 Ran.464; Earlier cases are Ma Saw Ngwe v. Ma Thein Yin, (1902) 1 L.B.R.198;
Po Sein v. Po Min,(1905)3 L.B.R.45;
Ma Su v. Ma Tin, (1912) 6 L.B.R. 77;
Po Hman v. Mg. Tin,(1915)8 L.B.R.113.
(71) Ma Hnin Yi v. Mg.Thin,(1940) Ran.32;
Mg.Paik v. Mg.Tha Shun,(1940) Ran.28.
(72) Mg.Paik v. Maung Tha Shun, (1940) Ran. 28.

grandchild's parent would have been entitled (73).

The right possessed by 'out-of-time' grandchildren, when in competition with collaterals and step-collaterals of their parents, to a share in their grandparents' estate is an exception to the general principle that the nearer excludes the more remote. The reason for this exception seems to be founded on the assumption that the grandchildren in such cases will probably be young and will require support; and that such support will ordinarily be provided by the child's uncles and aunts (74).

It will be noticed that although, as between themselves, the method of division between grandchildren descended from common grandparents is per capita, the division between such grandchildren, when in competition with uncles and aunts, is per stirpes. Thus where the relationship between the grandparent, children and grandchildren is as indicated in the following diagram:



All the individuals being dead except the grandchildren and a

---

(73) Mg. Shwe Ye v. Mg. Po Mya, (1925) 3 Ran.464.
(74) Mg. Hmaw v. Ma On Bwin, (1907) I L.B.R.104, (106).
Hmaw

son C3; then if C1 died in infancy and C2 C4 and C5 predeceased the grandparent, the estate of the latter will be divided in the following shares:

GC1 and GC2, being the children of C2, the eldest child will take together the same share as C3 i.e.seven-sixteenths or half of what remains after deduction of the shares of the children of C4 and C5. GC3, the child of C4 and GC4, GC5 and GC6 the children of C5 collectively, will each take a one-sixteenth share or one-quarter of what their parents' would have taken, if alive.

The shares are, therefore,

C3 .... 7/16

the children of C2 collectively seven-sixteenths, i.e.GC1 and GC2 each take seven-thirty seconds, GC3 the child of C4 takes one-sixteenth, GC4, GC5, GC6 the children of C5 collectively one-sixteenth, i.e. each takes one-forty-eighth (75).
Had C3 also predeceased the grandparent, then each grandchild would have received a one-sixth share, as the division would in that case have been per capita and not per stirpes, (76).

In Ma Hnin Yi v. Maung Thin (77) it was held that,

"Under the Burmese Buddhist Law (the) out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are

---

(75) Ma Su v. Ma Tin, (1912) 6 L.B.R. 77 at 82.
(76) Mg.Po Thu Daw v. Mg.Po Than,(1923) I Ran.316 (F.B.).
(77) (1940) Rangan.32.

the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased one or both of the grandparents was the orasa child, and all that is necessary to show is that their parent was the eldest child of the grandparents (78)."

Prior to this decision the view had been generally held that the only grnadchild who was entitled to share equally with his uncles and aunts was the out-of-time grandchild whose parent was the orasa; it is unfortunate that the reasons for the decision were not stated more fully. Neither the authorities nor the texts were discussed, but the judgement appears to be based on the ground that there had been confusion in the use of the terms "orasa" and "eldest child", and that on a proper construction of the texts it is the child of the latter who, if out-of-time, is entitled to the preferential share. The correctness of this view is, it is submitted, open to question.

Extracts from the Dhammathats dealing with the shares of grandchildren are collected in sections 162 and 163 of the Digest, and when referring to the parent of the out-of-time grandchild who is entitled to share equally with his uncles and aunts, they use different expressions, which have been translated, somewhat indifferently, either as the orasa or as the eldest child. Similar terms are used, however, in sections

---

(78) (1940) Ran. 32 at 33.

30 to 33 of the Digest which deal with the privileged position accorded to the first born child itself. The expressions used in these two groups of sections were analysed by Maung Kin, J., in his exhaustive judgement in Kirkwood's case (79), and his conclusion was that the child referred to in sections 162 and 163 is the same child as is entitled to preferential treatment in sections 30 to 33 of the Digest (80); that is to say, to the child now known as the orasa.

Heald, J., in the same case, after considering both the texts and the authorities, arrived at the same result. "I think," he said, "that it may now be taken as settled law that it is the children of the auratha as such who are entitled to preferential treatment" (81).

In Po Zan v. Maung Nyo (82), Hartnoll, J., said in the course of his judgement,

" ..... the reason for giving special treatment to the children of an eldest son or daughter.....where their parents die before their grandparents no doubt was on account of the superior claims of the "auratha" heir. The reason ceases to

---

(79) (1924) 2 Ran.693 (at 712,716)(P.C.).
(80) Kirkwood alias Ma Thein v. Mg.Sin,(1924)2 Ran.693 at 716(P.C.).
(81) Ibid, at 768, Pratt J. seems to have taken a different view, although it seems from his answer to the sixth question referred to the Full Bench, that the competency of the eldest child was a relevant fact, see P.726.
(82) (1912) 7 L.B.R.27.

exist where, as in the present case, the deceased parent never was the orasa and never could assume the position of such owing to the existence of another child who took the position of orasa in preference to her", (83).

In Po Hman v. Ma Tin (84) the claim of the grandchild, who was the son of the grandparents eldest child, was rejected on the ground that the eldest child was not, in this case, the orasa, the court observing that it could not "be held that the children of an eldest son or daughter who predeceased the parents are entitled to a preferential share except when such eldest son or daughter at the time of his or her death was the orasa child, i.e. had attained the complete status of orasa." (85).

The principle upon which these cases were decided is supported by dicta in a number of other cases; thus in Ma Gun Bon v. Maung Po Kywe (86) Burgess, J.C., said,

"If the eldest son or daughter die before the parents, the children are given the share of a younger brother or sister on account of the superior claims of the auratha heir. But the share of the children of a deceased brother or sister other than the auratha is reduced to a quarter of a brother or sister's share." (87).

---

(83) (1912) 7 L.B.R.27, at 29 - 30.
(84) (1915) 8 L.B.R.113.
(85) Ibid, at 115.
(86) (1897) II U.B.R.(1897-1901) 66 at 74.
(87) A passage quoted with approval in Mi Min Din v. Mi Hla, (1905) II U.B.R.(1904-6) Buddhist Law, Inheritance 61.

In Po Sein v. Po Min (88), Thirkell White, C.J., said:

"There is an unusual unanimity in the texts. If the orasa son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same as their youngest uncle or aunt. But this is strictly confined, in all the texts, to the children of the orasa or eldest son or daughter, strictly so called. There is no indication that this has any reference to the eldest surviving son or daughter, unless he or she is technically the orasa" (89), and the reason why a larger share was given to one of several grandchildren is stated by Fox, C.J., in a latter case to be because:

"The status (i.e. of orasa) having been obtained no other child could claim or attain the status and his children are entitled to whatever rights their father's status gives." (90).

Of the cases (91) to which reference was made in Ma Hnin Yi v. Maung Thein (92) the observations in Ma Saw Nywe's case (93) are inconclusive in character, as the expressions 'eldest child' and 'orasa' were used therein as interchangeable terms, as indeed they might as no question arose as to the competency of the orasa. In Po Zan v. Maung Nyo (94) the contest was between

---

(88) (1905) 3 L.B.R.45.
(89) Ibid at 46; see also U Sein v. Ma Bok,(1933)II Ran.158.
(90) Ma Su v. Ma Tin, (1912) 6 L.B.R. 77 at 82.
(91) Ma Saw Ngwe v. Ma Thein Yin,(1902) I L.B.R.198.
Ma Su v. Ma Tin,(1912) 6 L.B.R.77.
Po Zan v.Maung Nyo,(1912) 7 L.B.R.27;
Mg.Po An v.Ma Dwe,(1926)4 Ran.184(F.B.)Mg.Thein Maung v. Ma Kywe, (1935) 13 Ran.412(F.B.).
(92) (1940) Ran. 32.
(93) (1902) 1 L.B.R.198.
(94) (1912) 7 L.B.R.27.

the grandchild and the son of the deceased grandparent. The grandchild was the child of the eldest child of the grandparents; the son was the third and youngest child. The Court held that as the eldest child was a daughter she could not (on grounds since held to be erroneous) be the orasa so long as there was a son competent to assume the orasa's duties, and that, therefore, the grandchild was entitled only to one-quarter of his mother's share. Thus the cases of Po Zan v. Maung Nyo, (95) and Ma Su v. Ma Tin, (96) (which have been referred to), it is submitted, furnish no support for the proposition laid down in Ma Hnin Mi's case. It is true that in Ma Su's, (97) case Hartnoll, J., said:-

"Though many of the texts in section 162 say that the eldest son of an auratha son who is deceased shall receive the same as the youngest of his uncles, yet the reasonable and obvious meaning to put on the texts is that the children of the eldest son shall receive the same as the younger brother.....," but is is clear that the reference to "children of the eldest son" was made for the purpose of rejecting a claim put forward by one of the plaintiffs that where there was more than one grandchild the eldest child of the orasa (and not the latter's children collectively) were entitled to a share equal to that of

---

(95) (1912) 7 L.B.R.27.
(96)(1912) 6 L.B.R.77.
(97) (1912) 6 L.B.R.77.

the uncles and aunts. Of the two other cases to which reference is made, namely Maung Po An v. Ma Dwe (98) and Maung Thein Maung v. Ma Kywe (99), it is, with the greatest respect, difficult to ascertain any passage in the judgment in either case which throws any further light on the point at issue.

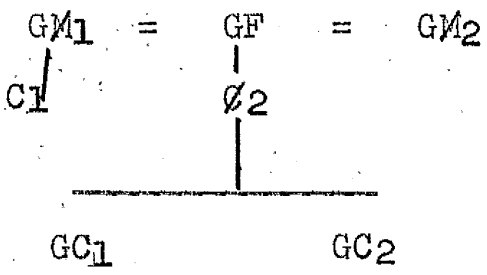
Ma Hnin Yi's case (100) was followed, it seems with some reluctance, in Maung Paik v. Maung Tha Shun (101), the Court holding that it was bound by the earlier decision. For the reasons which have been advanced the rule laid down in the cases prior to the decision in Ma Hnin Yi v. Maung Thin (102), is, it is submitted, to be preferred. The earlier rule, it is conceived, is not only in accordance with the provisions of the Dhammathats as interpreted by authority, but provides a logical bases for what otherwise appears a purely arbitrary rule, for no reason has been suggested why a special share should be given to one grandchild in preference to the others except on the ground that the grandchild's own parent is himself in a privileged position.

---

(98) (1926) 4 Ran. 184 (F.B.).
(99) (1935) 13 Ran. 412 (F.B.).
(100) (1940) Ran. 32.
(101) (1940) Ran. 28.
(102) (1940) Ran. 32.

(d) Grandchildren and Step-uncles and Aunts.

In competition with step-uncles and aunts, 'out-of-time' grandchildren take the share to which their parents would have been entitled had they survived (103).



Thus, if GF, the grandparent first marries GM_1, by whom he has a child C_1 and after her death he marries GM_2 who predeceases him but by whom he has a child C_2 who predeceases GF leaving issue GC1 and GC_2 the grandchildren GC_1 and GC_2 will be collectively entitled to a two-third share of the hnapazon of GF and GM_2 (104).

(e) Grandchildren and Stepgrandparents.

In the case of a grandchild in competition with a step-grandparent the following rules apply:-

(i) Where there are no children of the marriage of the grandparent and step-grandparent, the grandchild is entitled to one-half share of the grandparent's payin (105) and to one-eighth of the 'jointly acquired' property of the marriage of

---

(103) Ma Nan Shwe v. Ma Sein, (1924) 2 Ran. 514.
(104) Ibid.
(105) Ma Hnin Dok v. Ma U, (1898) II U.B.R.(1897-1901)126; Mg.Kadovv. Ma Kyin, (1900) II U.B.R.(1897-1901)164; Ma Hmun v. Ma Ngwe Thin, (1923) I Ran. 34.

grandparent and step-grandparent (106).

(ii) Where there are children of the marriage of the grandparent and the step-grandparent, the grandchild is entitled to nine-twentieths of the payin of the grandparent (107) and to one-eighth of the hnapazon of the marriage (108).

5. Person attending upon deceased during his last illness.

The Dhammathats say that when a person is supported and maintained or tended during his last illness and buried by a stranger instead of by those persons who should naturally do so, the stranger is entitled to inherit the whole of the property in possession of the person at the time of his death (109). By "stranger" is here meant (1) a stranger in blood, (2) a relative who is not in the ordinary line of succession, or (3) one who, though a natural heir, has lost, for some reason or other, the ordinary right of inheritance (110).

Section 62 of Book X of the Manugye refers to the case where the sick person and his attendant are related, and the former has no parents. It has been held that, upon a true construction of this Section, the claim of the attendant relative will not prevail where the deceased left a parent

---

(106) Ma Hnin Dok v. Ma U, (1898) II U.B.R.126;
Ma Hmun v. Ma Ngwe Thin, (1923) I Ran. 34.
(107) Ma Sa v. Ma Thet Hmon,(1898)II U.B.R.(1897-1901) 122;
Sein Tun v. Mi On Kra Zan, (1906) 3 L.B.R. 219.
(108) Sein Tun v. Mi On Kra Zan, (1906) 3 L.B.R. 219.
(109) Digest Volume I, section 314, 315.
(110) U May Oung, Leading Cases on Buddhist Law, 219.

surviving him, or an hier who stood higher than the parent in the scale of succession; and thus the claim of a deceased woman's sister, who had tended her in her last illness and buried her, was held not to prevail against that of a stepchild of the deceased (111).

Section 63 of Book X of Manugye deals with the case of one who is tended in his last sickness by a stranger.
This is based on a story which is as follows:-

"In times past, a rich man in Benares performed the ceremony of placing his infant son in a cradle and that of naming him simultaneously. During the ceremony he made a gift of a jewelled ring valued at a lakh of tickls of silver, and had it strung round the child's neck. On the son's attaining the age of seven years he was initiated into the holy order as a novice, and at the age of twenty-five years he was ordained a rahan. He then had the ring concealed between the folds at the border of his robe. Taking the proper utensils of a monk he went on a journey, but before he arrived at his destination he fell ill and was obliged to take shelter in a monastery about midway on his journey. His condition growing worse he was carefully attended to by the rahan in charge of the monastery. Having lost all hopes of his recovery he informed the rahan who attended on him, of his valuable possession concealed in the

---

(111) Daw Toke v. Ma Tin Ohn, (1934) 12 Ran.703.

folds of his robe and died not long afterwards. The rahan who attended on him during his illness cremated the corpse, picked up the unburnt bones and kept them with him. In course of time the father of the deceased, hearing of his son's death, followed up the journey and eventually arrived at the monastery where his son had breathed his last. He enquired of the rahan in the monastery and was informed of what had happened. The rich man wept and asked the rahan whether he had the precious ring which was in his son's possession. The rahan admitted that he had the ring with him. The rich man demanded that it should be made over to him, but the demand was refused. He then went to the Buddha and narrated the whole of the circumstances from the making of the gift of the ring leading up to the refusal of the rahan to give it up. The rahan also narrated all the incidents from the time of the deceased's taking shelter in his monastery to that of the preservation of his bones. The Lord Buddha decided that the person who attended on the deceased during sickness and buried him on death should get the ring."(111A)

In former days, when travelling was dangerous as well as arduous, this was probably a useful rule to ensure that a man away from home should receive attention in sickness and decent burial after death, but it is hardly suitable at the present day (112).

(111A) Digest, I, Sec.314.
(112) U May Oung, Leading cases on Buddhist Law, 219.

In Nga San Yun v. Nga Myat Thin, (113), wherein it was sought to oust the relatives of a deceased person, including her own son, Sanford,J.C., held that in view of the provisions of Section 71 of the same book, it is only when actual neglect or desertion is shown on the part of those who are, in the ordinary cause, entitled to inherit, that the stranger who assists in sickness and buries in death is entitled to exclude the heirs from the inheritance. A hired attendant who attends members of a family during their sickness and buries them with means derived from the family estate does not thereby acquire a right to inheritance in such estate (114).

When a man dies leaving no heirs, a stranger who has supported and looked after him in health and sickness and performed his funeral ceremonies is entitled to inherit the estate in preference to Government (115).

No case is, in fact, to be found in the reports in which the heirs of a deceased person have been excluded in favour of the person, relative or stranger, who attended the deceased in his last illness, and the rule is probably now obsolete (116).

6. Physically or Mentally Defective Children.

A physically or mentally incompetent or defective child is

---

(113) Nga San Yun v. Nga Myat Thin, (1875) S.J.46;followed in Mg.Chit Kywe v.Mg.Pyo, (1895) II U.B.R. 184; Mg. Shwe No v. Mg. Chit Twe, (1898) P.J. 465 Manugye, X, 71

(114) Mg. Shwe No v. Mg. Chit Twe, (1895) P.J. 465.

(115) U May Oung, Leading cases on Buddhist Law, 219.

(116) Per May Oung, J., in Mg.Po Thu Daw v. Mg. Po Than Daw, (1923) I Ran.316 at 333(F.B.).

entitled to his full share of inheritance (117). A person physically or mentally incompetent or defective includes a congenial idiot (118), a deaf mute (119) and a lunatic (120).

The subject is dealt with in sections 110 and 111 of the Digest. The Dhammathats are by no means unanimous upon this point. The earlier Dhammathats say that such a child is entitled to a smaller share. Thus Vilâsa (121) lays down that a co-heir who is physically and mentally defective, dumb, deaf, insane, leprous, or blind, "shall not share equally with the other co-heirs but shall be given merely a portion sufficient for his maintenance". In all early law shich has not a matrilinial basis, the physical or mentally defective being unable to fight or otherwise contribute to the defence or benefit of the family or community is disqualified from inheritance. In the Dhammathats, the fact of being a descendant gives the right to inherit, and capacity is only relevant to the question of fixing the share. Thus, all children of the parents are entilted to inherit equally but if any amongst them be physically or mentally deficient, he gets a smaller share. The later Dhammathats adopt the more modern view and give to defective or incompetent children a full share

---

(117) Mg.Pan Gyaw v. Ma Bein,(1927) 6 Ran.128;
(118) Mg.Pan Gyaw v. Ma Bein,(1927) 6 Ran. 128,
(119) Ma Saw Win v. Mg.Gyi,(1924) 2 Ran. 328; the headnote would appear to be inaccurate.
(120) Ko San Dwe v. Ma Nyein Hla, (1928) 6 Ran. 485.
(121) Digest 1, Section 110.

of inheritance.

Thus Manuvannanâ says (122):- "The precedent of the woman who bore a snake, who demanded and obtained his share of inheritance, must be borne in mind, and though a co-heir may be ill-favoured by nature, he should be given his proper share".

In section 111 of the Kinwan Mingyi's Digest, volume 1, all the other extracts, excluding the extract from Pyu, clearly provide that a child who is physically or mentally incompetent or defective is entitled to his full share of inheritance, and that on the death of such person, his share of inheritance shall go to the co-heir who supported and maintained him.

To what extent the ordinary rules of devolution of the estate would be departed from where the deceased was a lunatic or so physically impaired as to be unable to look after his or her own property was considered in the cases of Mi Kan Yon v. Nga Paw, (123), Ma Saw Win v. Maung Gyi, (124) Ko San Dwe v. Ma Nyein Hla, (125) and Mg. Tha Yan v. U Myat Mg, (126). It was held in the two earlier cases that where a brother or sister of the deceased was entrusted with the share of property set apart on the partition of the parental estate for the defective person and the brother or sister looked after and supported that person throughout his or her life, that brother or sister

---

(122) Digest 1, section 110.
(123) (1911) 5 B.L.T. 61.
(124) (1924) 2 Ran. 328.
(125) (1928) 6 Ran. 485.
(126) (1949) B.L.R. 50.

is the heir to such person. The principle was sought to be extended in Ko San Dwe's case (127) in favour of all relations who take care of lunatics; but Pratt, C.J., (with whom Cunliffe,J.,agreed) held that the principle of Manugye, X, 36 should not be extended in the manner suggested:- "To hold that the relative or relatives who took care of and supported a Buddhist lunatic would in all cases as a matter of course be entitled to his share in the parental estate for their pains might have far reaching consequences and would be establishing to my mind a dangerous precedent".

In Mg. Tha Yan v. U Myat Maung, (128), U San Maung,J., pointed out that Richardson's translation of the Burmese text of section 36, Book X,of Manugye is somewhat misleading and it should read as follows:-

"If amongst the children of a couple so given in marriage by their parents, one shall have several diseases, shall be unable to walk, shall stutter, or be dumb, let the share such child is entitled to be set aside, and let co-heirs (not relatives) support it, and at its death, let the person who so supports take its share."

The word 'relation' appearing therein can be misinterpreted as meaning realtions other than co-heirs. It was therefore held

---

(127) (1928) 6 Ran. 485.
(128) (1949) B.L.R. 50.

that only a co-heir looking after a deaf mute person can inherit to the exclusion of other co-heirs; but any other relation or an outsider looking after a deaf mute, cannot exclude the natural heirs.

7. Stepchildren and Step-Grandchildren.

The rule dealing with step-children in competition with the children of the step-parent will be dealt with under 'Partition'.

In Burmese Buddhist Law, stepchildren (pubbaka) are entitled to inherit. Stepchildren are treated as descendants and therefore oust collaterals (129), for by Buddhist Law the property never ascends as long as it can descend. Burgess J.C., said (130),

"The point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as theccase may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood realtions".

With regard to undivided ancestral property, stepchildren and step-grandchildren are together entitled to a half share, and the collateral blood relations are entitled to the

---

(129) Digest 1, 295.
(130) Ma Gun Bon v. Mg. Po Kywe,(1897)2 U.B.R.(1897-1901) 66; approved in Mg. Dwe v. Khoo Haung Shein,(1924)3 Ran.29(P.C)

remaining half. Their Lordships of the Privy Council left open the question of who would succeed in competition between step-child and step-grandchild but said either would exclude a collateral (131).

The principle that inheritance shall not ascend, or if it must ascend, shall not do so more than necessary, applies in the case of stepchildren. Thus:

(1) a stepson excludes a step-granfather (132).

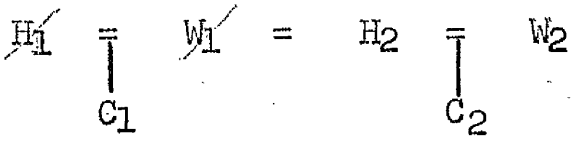
(2) a half brother of the mother of the deceased excludes a full cousin of the father of the deceased (133).

(3) a stepchild excludes the maternal grandmother (134), a nephew or niece is not, however, excluded by a half brother or half sister; both are regarded as heirs (135), and have been held to stand in the same degree of relationship, and, therefore, to be entitled to share equally (136).

It is, however, to be observed that the children of a step-parent's deceased wife by a former husband only became the step-parent's heirs (save possibly as regards the deceased wife's thinthi property) when the latter dies leaving neither a widow nor issue. Thus:

---

(131) Mg. Dwe v. Khon Haung Shein, (1924) 2 Ran. 29 (P.C.).
(132) Mg.Sein Thwe v. Ma Shwe Yi, (1920) 10 L.B.R. 396396.
(133) Ma Kyaw v. Mg.Po Myit,(1925) 3 Ran. 86.
(134) Ma Gyi v. Ma Khin Saw, (1922) II L.B.R. 460.
(135) Ma Kin Oh v. Ma Kin Gale, (1929) 8 Ran. 10.
(136) Ma Galay v. Ma E. Mya, (1929) 8 Ran. 23.



If W_1 marries H_1 and has issue C_1, after which H_1 dies and W_1 marries H_2 of which union there is no issue. After the death of W_1, H_2 marries W_2 and has issue C_2. Then C_1 can have no claim to the joint property of H_2 and W_2 if either W_2 or C_2 survives H_2 (137).

It is no more incumbent upon a stepchild or step-grandchild than upon any other heir, to prove affirmatively that he or she has not broken off filial relations in order to be entitled to inherit; the burden of proving unfilial conduct is in both cases upon him who asserts it (138).

---

(137) San Pe v. Ma Shwe Zin, (1918) 9 L.B.R. 176; dissented from on another point in Mg. Aung Thin v. Ma Ngwe U, (1928) 6 Ran. 355.

(138) Mg. Kyaw Yan v. Mg. Po Win, (1904) II U.B.R.(1904-6). Buddhist Law, Inheritance 1; Mg. Dwe v. Khoo Haung Shein, (1924) 3 Ran. 29 (P.C.).

CHAPTER XIV.

THE ORASA CHILD.

1. Historical Development of the Concept of Orasa.

Primitive polity, in general, took no note of the individual; the group or family, knit by ties of kinship, real or fictitious, was the ultimate unit it recognized. The polity of the ancient races, whose descendants are the Burmese people of the present day, was not differently fashioned. The Dhammathats, compiled as they were in times when disintegrating influence had been at work for centuries and the individual had ousted the family, yet disclose unmistakable vestiges of an earlier stage in the evolution of society, when the individual was submerged in the family (1).

Retribution for offences against the State long continued to be exacted not only from the offender but also from his family (2). The cause of action for a tort enured to the family of the injured as against that of the tort-feasor; later amendments confirming the right to exact and the liability to make compensation for adultery to the injured husband and the adulterer but served to prove the one-time universality of the rule of family rights and obligations (3). Manugye states the rule making the family of a deceased debtor liable for his

(1) U E Maung, Burmese Buddhist Law, 148.
(2) Digest. I, 10.
(3) Digest.II, 451-454.

debts (4); and a similar rule appears at section 12 of Wagaru's Dhammathat.

The family, in all external relations, was represented by its head, usually the highest living ancestor. In him resided, vis-a-vis the rest of the community, the collective rights and duties of the family; one result was the magnification of his authority in internal administration of the family. Such proprietary rights, as were known to the ancient system of law, were exercised by him; the possibility of other individual members of the family exercising rights of ownership, separate from the family, did not appear to have been contemplated. Inroads were subsequently made on the power of the head of the family; and from his absolute control were withdrawn eighteen classes of acquisitions made by the individual members of the family, such acquisitions being technically known as the thinthi of the person acquiring the same (5). To this list of exceptions were later added certain other kinds of property; but even the most recent of the Dhammathats regarded proprietary incapacity of the individual members of the family the rule, on to which considerations of equity or public policy had grafted exceptions in special circumstances. Any acquisitions, outside of the exceptional classes, made by a son or a daughter, was treated as part of the parents' estate, subject to partition

(4) Manugye, Bk.III, Sec.70.
(5) Digest, I, Secs.54, 119-136.

between all the heirs of the parents (6). The position was the same in Ceylon under the old Law of Thesawalamai; as community of property was recognised, the sons were bound to bring into the common estate all that they had gained during their bachelorhood. An exception was made in the case of wrought-gold or silver ornaments worn by them which had been acquired by their exertions or given by the parents. Lawrice, A.C.J., said in Umavatipillai v. Murugesar (7); "It is natural to find in the customary law some traces of the law of Hindu joint family, but there are traces only. The law of the joint family has never obtained in Ceylon."

Similar wide powers were anciently exercised by the head of the family over the persons of the members of the family. The parent could sell his child into slavery (8); and for the debts of the head of a family, his wife and descendants could be sold (9). The parents could modify at pleasure the conditions of their descendants; they could give a wife to their son; they could give their daughter in marriage (10).

As the community progressed on the road to civilization, the authority of the parent over the persons of the children assumed humbler proportions. The rights of the sons and

(6) Digest, I, secs.28, 71-74, 77, 115-117.
(7) 3, Balasingam's Report quoted by H.W.Tambiah, in The Laws and Customs of the Tamils of Jaffna, 142.
(8) Digest, I, 56.
(9) Manugyé, III, 2.
(10) Digest, I, 19; Manussika and Vilasa.

daughters to contract marriage for themselves and to repudiate the consorts provided by the parents came gradually to be conceded. But old ideas die hard; and unless the union was sanctioned by the parents on both sides, the children born of the marriage were not permitted to share in the family estates (11). They were kinsmen but not heirs to their grandparents. As happened in all early systems of jurisprudence, the authority of the head of the family was relaxed sooner over the persons of the individual members than over the property of the family. Restraint on personal liberty being found more irksome and the exigencies of the common weal justifying a loosening of the reins, the sons and daughters were allowed to contract marriage for themselves. (12)

It was apparently at this stage of evolution of Burmese society that the form, methods of classification and technical nomenclature of Hindu jurisprudence were introduced into the country. But the conditions in Burma were different from those in India; the daughter on marriage did not become a stranger to her parents' family; her marriage more often than not resulted in an increase to her parents' family, by the son-in-law's entry into it (13); even if she left her parents on marriage, in her widowhood she resumed her place in her natural family (14); and the Hindu rule that only a Putrika

(11) Digest, I, 96.
(12) U E Maung, Burmese Buddhist Law, 151.
(13) Digest, II, 318, 319.
(14) Digest, I, 345.

daughter (15) could raise a progeny to her father's family found no parallel in Burma. The term orasa has been borrowed from the Sanskrit word aurasa and has been corrupted into the Burmese word auratha or orasa (16). The Orasa, the legitimate son of Hindu jurisprudence, became, in Pyu, Vaṇṇanâ, Sônda, Manuvaṇṇanâ, Mânussika, Vilâsa, Dhamma, Râsi, Amwebôn, Cittara, Dhammathatkyaw, Manuhkye and Kyannet (17), the child of a union contracted with parental sanction on both sides, the first three of the above Dhammathats stating, what was implied in the others, that only such children were entitled to inherit the estates of their grandparents.

Later and apparently contemporaneous with the recognition of the kittima children's right to a share in the family estate of the adoptive parents (18), all grandchildren, other than the kilitha, came to be recognized as potential heirs to the grandparents. The children of a union, not sanctioned by the parents, being placed on the same footing as the children of a union entered into with parental sanction; it became pointless to describe the latter as orasa. But the term was still retained, a new content being given to it. The orasa now became the children by a superior wife in contradistinction to children

(15) Manu, Ch.IX, 127.
(16) S.C. Lahiri, Burmese Buddhist Law, 173.
(17) Digest, I, 18-20.
(18) Digest, I, 301.

by a free concubine or a slave wife (19). It was of the orasa of this period that Vannanadhamma said that etymologically they were ura jata (bosom born); it was of them that Manu, repealing the idle conceit beloved of the mediaeval schoolman, said that they were sayaṁ janito suto (sons fashioned by oneself) and urassa manasa nimmito (those who were created out of the bosom by the exercise of mental faculties) (20).

Later still, the expression acquired a special meaning. A false analogy from the Pali idiom, not infrequently describing a group or a class by the leading item thereof, with the affix ādi, probably, led to a confusion between the eldest child and the orasa (21). The statement in Manugye (22) that the children par excellence in matters of inheritance are 'children male and female, old and young, born to a couple given in marriage by their parents, commencing with the auratha' lends support to this theory. From this, it is but an easy step, for the orasa to become a child entitled to special privileges in the parental estate, metonymic usage helping to replace the individual by his attributes. It is to this connotation of a child who enjoys special privileges in the parental estate and whose children are preferred before other grandchildren that modern usage practically confines the expression "orasa"(23).

(19) Digest, I, 16.
(20) U E Maung, Burmese Buddhist Law, 153.
(21) Ibid, 154.
(22) Bk.X, Sec.81(1); page 314.
(23) U E Maung, Burmese Buddhist Law, 154.

Historical considerations, thus explain how the possibility of a daughter being the orasa was not precluded at Burmese Buddhist Law. The general impression in the popular mind is that contained in a saying found in some of the books (24):- Akokyihyi hlyin apha aya, ama kyi hlyin ami aya (the eldest brother takes the father's place, the eldest sister takes the mother's place.) No one ever challenged the right of the eldest son or that of a daughter when she is the only child or that of the eldest daughter in a family of daughters to claim orasaship (25); but where a son exists, it has been claimed that the rule, said to be a part of the Burmese Buddhist law, of the superiority of the male operates to affect detrimentally the first born daughter's claim. On the one hand, it has been said (26) that the first born daughter is postponed to her younger brother, the eldest son of the family; on the other, it has been said that both first born daughter and the eldest son are entitled to preferential rights as the orasa (27). Yet again in Tha Tu v. Maung Bya (28), the court apparently took for granted that the eldest born daughter's rights are superior to those of her younger brothers.

In view of these conflicting decisions, a Full Bench of the

(24) Manugye, X,22 and Digest I, 49.
(25) S.C. Lahiri, Burmese Buddhist Law, 175.
(26) Ma Myaw v. Po Thin, (1899) P.J.585;
Maung Seik Kyaung v. Mg.Po Nyein, (1900) 1 L.B.R.23;
Ma Saw Ngwe v. Ma Thein Yin, (1902) 1 L.B.R.198;
Po Sein v. Po Min, (1905) 3 L.B.R. 45÷45;
Po Hman v. Mg. Tin, (1915) 8 L.B.R.113.
(27) Mi Min Din v. Mi Hla, (1905) II U.B.R.(1904-6 B.L. Inh.,11.
(28) (1908) 4 L.B.R. 280.

Chief Court of Lower Burma was, in Maung Sin v. Ma Thein (29), invited to consider the respective claims of the first born daughter and the eldest son to the Orasaship of the family. The learned Judges were unanimous in holding that the conception of the superior rights of the male was an exotic intrusion from the Hindu Law and that it never took root in the country. The Privy Council on appeal from the Chief Court of Lower Burma in Kirkwood v. Maung Sin (30) stated the position thus:- "as the compilers of the Dhammathats absorbed the national customs and usages, the sex-equalisation, which is the dominant feature of the Burmese Law, prevailed and the later Dhammathats show that the eldest born son and the eldest born daughter stand on the same footing."

As was mentioned by the learned Judges of the Chief Court of Lower Burma, the compilers of the Dhammathats occasionally reproduced in their works, passages from the institutes of Manu and other Indian sources, indicative of the lower position Indo-Aryan customs assigned to the women; but hardly anywhere in the Dhammathats is to be found the theoretical inferiority of the female translated into practice. This is as it should be; with the learning of the Hindu Dharmashastras came into the country the teachings of the Buddha, with whom neither the sex, nor the fortuitous circumstances of birth but personal merit decides the worth of the individual. Moreover in a family system, where the daughter not only was not transferred by

(29) (1922) 11 L.B.R. 220.
(30) (1924) 2 Ran. 693 (P.C.); 51 I.A. 334.

marriage to the husband's family, but more often than not helped to increase the strength of her family by bringing the son-in-law within its folds, her position in the family is a strong one (31). In the circumstances, the conclusion came to by the Chief Court of Lower Burma and the Privy Council, that the rights of the first born daughter are in no way inferior to those of the first born son, is inevitable.

It follows, therefore, that a son who follows the first born daughter is in no better position than if his senior is the eldest born son. It is clear that the rules in the Dhammathats (32) giving special rights to the eldest son and the eldest daughter are not cumulative but are mutually exclusive. As enunciated in Kirkwood (a) Ma Thein v. Mg. Sin (33), under no circumstance can there be more than one orasa in a family.

It now remains to consider what the special privileges are which, under the Burmese Buddhist Law, the orasa enjoys.

2. Special rights of the orasa child.

An orasa child is entitled, in the circumstances hereinafter mentioned, to a one-fourth share in the property of his or her parents (34).

---

(31) U E Maung, Burmese Buddhist Law, 157.
(32) Digest, I, 30, 33, 161, 162.
(33) (1924) 2 Ran.693 (P.C.); 51 I.A. 334.
(34) Tun Tha v. Ma Thit, (1916) 9 L.B.R.56 (P.C.); and see Kirkwood (a) Ma Thein v. Mg.Sin, (1924) 2 Ran.693 (P.C.); also in re Mg.Thein Maung v. Ma Kywe, (1935) 13 Ran.412 (F.B.)

The property in which the orasa is entitled to claim a share may be defined as the general joint estate of the orasa's parents or parent at the time when the claim arises; and includes the payin of the parents as well as the lettetpwa and hnapazon of their marriage (35). It is one-quarter of the entire estate which would otherwise be held by the surviving parent, or if there be no surviving parent, of the entire estate which would otherwise be available for distribution among the heirs of the deceased.

An orasa child is, however, only entitled to a preferential share in the property of his own parents; and he therefore is not entitled, in the event of his father taking a second wife in the lifetime of his mother, to any share, as orasa, in the jointly acquired property of his father and the second wife.(36).

3. When the orasa child may claim partition.

On the death of the parent of the orasa child of the same sex, the orasa can claim a quarter share of the parental estate from the surviving parent of the opposite sex (37). Thus, an orasa son can claim a quarter share of the parental estate on the death of his father from the surviving mother (38).

(35) Tun Tha v. Ma Thit,(1916)9 L.B.R.56(P.C.);
Ma Hla U v. Mg.Shwe Yin,(1923) 1 Ran.370;
and see In re Mg.Thein Maung v. Ma Kywe,(1935)13 Ran.412(F.B.)
(36) In re Mg.Thein Maung v. Ma Kywe,(1935) 13 Ran.412 at 424 (F.B.)
(37) Ma Hla U v. Maung Shwe Yin, 1 Ran.370(371);
(1923)
Manugye Bk. 10. Sec.5.
(38) Kyi Hlaing v. Ma Hlu,(1915) 8 L.B.R.189;
Maung Pan On v. Maung Tun Tha, (1921) 11 L.B.R.292.

Similarly an orasa daughter can claim a quarter share of the parental estate on the death of her mother from the surviving father (39). But an orasa son cannot claim a quarter share of the parental estate on the death of his mother from the surviving father (40). Similarly an orasa daughter cannot claim a quarter share of the parental estate on the death of her father from her surviving mother (41).

In the present state of the authorities, the question whether an orasa child qua orasa is also entitled to claim partition, if a son, on the re-marriage of his father after the death of his mother, or if a daughter, on the re-marriage of her mother after the death of her father, is one which is not free from doubt. An eldest child as such, is, upon the re-marriage of a surviving parent, entitled to a quarter share of that parent's property (42), and the question is whether, upon the surviving parent's re-marriage, an orasa child has any claim which is distinguishable from that of the eldest child.

The question is one of practical importance, for, if the orasa, qua orasa, is entitled to claim partition upon the re-marriage of the surviving parent of the same sex, his or her children will, in the event of the orasa dying while his or her

(39) Ma Hla U v. Mg.Shwe Yin, (1923) I Ran.370(371)
(40) U Ni Ta v. Ko Maung, 13 B.L.T.207.
(41) Mi Hlaing v. Mi Thi, (1914) II U.B.R.(1914-16) 40.
(42) Mg.Po Kin v. Mg. Tun Yin, (1926)4 Ran.207.

interest is still contingent, be entitled to a special share (43) to which, had they been merely the children of the eldest child, they would have had no claim.

The class of claim now under consideration had been treated as that of an eldest child in most of the decided cases. Thus, in Maung Shwe Ywet v. Maung Tun Shein (44) Heald, J., after an examination of major Dhammathats, said:-

"One is therefore driven to the conclusion that although the writers of these Dhammathats, and particularly of Manugye, did not actually say in so many words that the right of the auratha to take the one-fourth share of the estate on the re-marriage of the surviving parent was a different right from that of the auratha to take a one-fourth share on the death of the parent, probably because there was in the older law books which they were reproducing no recognition of the right to take a share on re-marriage, nevertheless the right which they had in their minds, vaguely it may be, was not identical with the recognized right of the auratha to take one-fourth on the death of the parent, and was probably a right, by that time well established by custom, allowing the eldest child, whether grown-up or not, to claim one-fourth of the estate on the re-marriage of the surviving parent, although he or she was not in a position to claim that right by reason of the parent's death."

---

(43) as to which, see para.5 (infra).
(44) (1921) 11 L.B.R.199 at 205.

Similarly in the later case of Ma E Mya v. U Pe Lay (45) Lentaigne, J., said:-

"As pointed out above the claim which it is alleged that Maung Po Min had to one-quarter share on the re-marriage of his father was not a claim as orasa son arising on the death of a parent; but it was an entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent."

In 1930 Otter and Brown, J.J., in the case of Maung Kyin v. Ma Kya Gaing (46), had to consider the right of one Ma Hla Yin to a quarter share of her parent's estate upon the re-marriage of her mother after her father's death. Ma Hla Yin was a minor when her father died, but had attained majority prior to her mother's subsequent re-marriage. Otter, J. held that, since Ma Hla Yin came of age before her mother's re-marriage, she acquired the status of an orasa and, as such, he held that she was entitled to the quarter share. Brown, J., agreed that Ma Hla Yin was entitled to a quarter share but, it is to be observed, on the ground that Ma Hla Yin, at the date of her mother's re-marriage, was the eldest child; and whether she was technically the orasa he regarded as immaterial. The only other authority for the view that the orasa child qua orasa is entitled to claim partition on the re-marriage of the parent of

(45) (1925) 3 Ran.281 at 287.
(46) (1930) 8 Ran.396; see also U Tauk Ta v. Ma Ohn Yin, (1939) Ran.L.R.217.

the same sex is to be found in certain obiter dicta of Sir Arthur Page, in the Full Bench case of in re Maung Thein Maung v. Ma Kywe (47). As authority for his view the learned Chief Justice relied on two cases (48) both of which dealt, however, with the claims of an eldest child, who was not necessarily the orasa, to a one-quarter share on the re-marriage of the surviving parent. It would appear, in fact, that the learned Chief Justice regarded the claims of an orasa child and an eldest child in such circumstances as being identical.

The better opinion, it is submitted, is that the right to a quarter share upon the re-marriage of the surviving parent is one which appertains not to the orasa, qua orasa, but to the eldest surviving child of the family. The contrary view leads to serious difficulties; for if the orasa takes qua orasa then it would appear that:-

(1) the children of an eldest child who has acquired the status of orasa but dies before the re-marriage of the surviving parent of the same sex, will have a privileged position, namely that of the children of an orasa (49), to which they would not be entitled had their parent been the eldest child and not the orasa.

(2) If the eldest child is incompetent to acquire the status of orasa (50), and the status is acquired by the next

(47) (1935) 13 Ran.412 (F.B.).
(48) Mg.Po Kin v. Mg.Tun Yin, (1926) 4 Ran.207; Ma Thein v. Ma Mya, (1929) 7 Ran.193.
(49) As to which see para.5 (infra)
(50) If, for example, he or she is incompetent.

child entitled thereto, there will, on the re-marriage of the surviving parent, be both an eldest child and an orasa. To hold, in such circumstances, that the eldest child and the orasa is each entitled to a quarter share, would deprive the other children of the marriage of that interest which they have in the half share of the surviving parent's estate which upon the latter's re-marriage is subject to division between all the children (51).

4. Acquisition of the status of orasa child.

A child acquires the status of orasa when the following conditions are fulfilled, that is to say the child must:-

(i) be legitimate

(ii) be natural born

(iii) have attained majority before the death of the parent of the same sex

(iv) be, at the date upon which majority is attained, the eldest child of the family and competent to assist in the discharge of the duties of the father or mother, as the case may be

(v) 'help either in the acquisition of the family property and the discharge of the father's responsibilities; or if a daughter, help the mother in the care of the

(51) See Mg.Po Kin v. Mg.Tun Yin, (1926) 4 Ran.207; Maung Aung Pe v. U Tun Aung Gyaw, (1930) 8 Ran.524; O.H.Mootham, Burmese Buddhist Law, 94.

property and the control and management of the household, which lie particularly within the mother's duties.' (52)

There is no single authority which enumerates the above requisites as necessary for the attainment of the status as orasa, but it is submitted that the authorities as a whole establish the necessity for the fulfilment of each of the conditions, with the possible exception of (v), (53).

It is clear that an illegitimate child cannot be the orasa (54). The privileged position of the orasa is based on the theory that he or she shall undertake certain family responsibilities on the death of the father or mother, coupled with the fact that the parents obtained the child by their earnest prayers at the commencement of their wedded life, and acquired their property with his or her assistance (55).

The orasa must be natural born: the status of orasa cannot be acquired by an adopted child (56). Although the rights of a kittima adopted child were at first held to be of an inferior nature, for many years judicial decisions have recognized the

(52) Kirkwood alias Ma Thein v. Mg.Sin, (1924) 2 Ran.693 (P.C.)
(53) O.H. Mootham, Burmese Buddhist Law, 95.
(54) See the remarks of May Oung, J., in Ma Hla U v. Mg.Shwe Yin, (1923) 1 Ran.370; and of Page, C.J., in re Mg.Thein Maung v. Ma Kywe, (1935) 13 Ran.412 (F.B.)
(55) Vilasa Dhammathat, quoted in Kirkwood alias Ma Thein v. Mg.Sin, (1924), 2 Ran.693 (P.C.)
(56) Mg.Po An v. Ma Dwe, (1926) 4 Ran.184 (F.B.).

right of the kittima child to share equally with the natural born child and a Full Bench of the Rangoon High Court (57) declared that the special right of orasa was an exception to this general rule of equal partition amongst children and that it should not be extended to give to a kittima child the rights of an orasa child (58).

A minor child cannot be the orasa (59); and it is clear that majority must have been attained, in the case of a son, prior to the death of his father, or in the case of a daughter prior to that of her mother (60). Whether it is necessary that majority should be attained during the life-time of both the parents is doubtful, the authorities being at variance (61). In Ma Aye Yin v. Ma Mi Mi (62), the Court was of opinion, purporting to rely on Kirkwood's case (63) that majority must be attained during the lifetime of both parents, but Kirkwood's case does not seem to support this view, which was subsequently expressly dissented from by Otter, J., in Mg.Kyin v. Ma Kya Gaing (64).

(57) Mg.Po An v. Ma Dwe,(1926)4 Ran.184 (F.B.)
(58) Followed in Mg.Thein v.uTha Byaw,(1939) Rgn.~~L.R.344~~(F.B.)
(59) Tun Myaing v. Bo Tun, (1904) 2 L.B.R.292;
Kirkwood (a) Ma Thein v. Mg.Sin,(1924) 2 Ran.693(P.C.)
(60) Ibid.
(61) See O.H.Mootham, Burmese Buddhist Law, 96.
(62) (1929) 7 Ran.569.
(63) (1924) 2 Ran.693 (P.C.)
(64) (1930) 8 Ran.396.

Provided that the eldest child has attained majority, it is immaterial whether the child is a son or a daughter; either may be the orasa. Doubts on the subject were set at rest by the decision in Kirkwood's case (65), the leading case on the subject of orasa children.

If the first born child dies in infancy, the right to acquire orasa status passes to the next child. This was so held in Ma Aye Yin v. Ma Mi Mi (66), where the Court decided that the first born child, a daughter, having died during minority, the next child, a son, was capable of acquiring, and had in that case in fact acquired, the status of orasa. A similar conclusion was arrived at by Otter, J., in the subsequent case of Mg.Kyin v. Ma Kya Gaing (67), where he held that the death during infancy of the first born, a daughter, was no obstacle to the status of orasa being acquired by the next child, a son.

Mootham says that these decisions go further than any earlier authority in holding that, upon the death during minority of the first born child, the right to acquire the status of orasa passes to the next child irrespective of whether that child was of the same sex as the first born, and the view expressed in the judgements would certainly appear to be opposed to the texts (68).

(65) (1924) 2 Ran.693 (P.C.).
(66) (1929) 7 Ran.569.
(67) (1930) 8 Ran.396.
(68) Burmese Buddhist Law, 97.

It is true that in the leading case of Kirkwood alias Ma Thein v. Maung ~~Sein~~ Sin (69) the Judicial Committee said:

"Supposing there is a daughter intervening between the two sons, viz. the first born and the next born son, she could not possibly be the orasa child."

But in Kirkwood alias Ma ~~Sin~~ Thein's case (70), Heald J., said,

"I think from my experience of cases under Burmese Buddhist Law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as auratha."

The dictum received no adverse comment when the case was considered on appeal by their Lordships of the Privy Council. It was approved in Ma Aye Yin v. Ma Mi Mi (71). In all earlier cases it had been held that, if the first born child died in infancy, the orasa status could only be acquired by a later child of the same sex, but in none of these cases does it appear that the claim of an intervening child of the opposite sex to the first born specifically come up for consideration. (72)

(69) (1924) 2 Ran.693 (P.C.).
(70) Ibid at 746.
(71) (1929) 7 Ran. 569.
(72) See Tun Myaing v. Ba Tun, (1904) 2 L.B.R.292;
Ma Hnin Gaing v. Ma Tha Li, (1911) 4 B.L.T.74;
Ma Su v. Ma Tin, (1912) 6 L.B.R. 77;
Nga Lu Daw v. Mi Mo Yi, (1915) 2 U.B.R.66.

In Ma Ein Thu v. Mg.Hla Dun (73), it was held that, if the eldest child is a son and all the other children are daughters, the status of orasa can, in the circumstances, be acquired by the next child, the eldest daughter.

Vaṇṇanā clearly says, (74),

"The child who assists the parents in their business, discharges their debts, and performs with zeal his or her filial duties shall get a larger share of the inheritance, although he or she may be one of the younger children."

In Maung Paik v. Mg. Tha Shun (75)it was held that children who do not grow up are disregarded and the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would be regarded as orasa. It is the eldest surviving son (or daughter) that is to be regarded as orasa.

It is submitted that in these circumstances the law must at present be taken to be that expounded in Ma Aye Yin's case and regarded as definitely settled.

In the early case of Ma Mya Thu v. Mg.Po Thin (76), Birks, J., enunciated the principle that for a child to attain the status of orasa child he or she must be competent to discharge the duties, if a son, of the father and, if a daughter, of the mother, and in Kirkwood's case (77) it is clear that

(73) (1912) 5 B.L.T.73.
(74) Digest, I, sec.62.
(75) (1940) Ran. L.R.28.
(76) (1899) P.J.585.
(77) (1924) 2 Ran.693 (P.C.).

the Privy Council regarded competency as essential to the attainment of the status.

In the leading case of Kirkwood, alias Ma Thein v. Maung Sin (78) the Judicial Committee said:-

"The status does not depend on the decease of the father, where the child is a son; or of the mother, where it is a daughter; it comes into existence on the fulfilment of three conditions, viz. (i) that he or she is the first born child; (ii) that it attains majority; and (iii) helps the family either in the acquisition of the family property and the discharge of the father's duties, or if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties."

If this was intended as a statement of the law as it is at the present day, it is clear that mere competency to undertake the duties of the particular parent would not be enough; there should be actual assistance in the discharge of the parents' duties. The passage quoted above, however, is part of a longer passage which commences as a commentary on S.33 of the Kyetyo explaining why, upon the death of her mother, the eldest born daughter becomes entitled to a one-fourth share; and it is

---

(78) (1924) 2 Ran. 693 (P.C.) at 786.

possible, therefore, that the three requisites referred to by their Lordships were merely intended as a summary of the provisions of the Kyetyo. This was the view taken by a Bench of the High Court in the subsequent case of Ma Aye Yin v. Ma Mi Mi (79), where the Court stated that "The remarks on the point are a summary of the result of extracts from the Dhammathats and cannot in our opinion be interpreted as intended to lay down any definite law on this point."

The real question is whether the passage quoted from Kirkwood's case (80) was obiter or not, and although, in effect the Court in Ma Aye Yin's case (81) held that it was, the point does not appear to have been fully considered. It was indeed on this account that a Bench of five Judges heard the appeal in Daw E v. Maung Aung Thein (82). It was pointed out in this case that in the decision of their Lordships of the Privy Council in Kirkwood alias Ma Thein v. Maung Sin (83), the passage quoted from the Kyetyo Dhammathats is a quotation only and does not embody the decision of their Lordships. Their Lordships were there dealing with the definition of the term "orasa daughter" for the purpose of deciding whether there could be an orasa son in the family as well as an orasa daughter.

---

(79) (1929) 7 Ran.569.
(80) (1924) 2 Ran.693(P.C.).
(81) (1929) 7 Ran.569.
(82) (1941) Rgn.~~L.~~R.665 (F.B.)
(83) (1924) 2 Ran.693(P.C.).

The third qualification of the orasa son or daughter quoted there from the Kyetyo was that he or she, if a son, helped in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helped the mother in the care of the property and the control and management of the household. It was not that their Lordships did not lay down a rule which they intended should be rigidly followed, but it was that the rule laid down by their Lordships was that it is only necessary for the eldest child to be competent to undertake the responsibilities of the deceased parent and not that it is necessary for him to help in the acquisition of the family property. In this case, the orasa son was a dull boy at school, and on leaving school he was 'tried out' by his mother as a salesman of slippers in the family business conducted by her. Although he was not a success, he was not entirely cast aside. He did assist, although his assistance may have been of temporary nature and of little value. There was no evidence at all that he refused to assist when called upon to do so. The learned trial and appellate Judges found that he was competent to assume the responsibilities of his father. It was held that competence to undertake the responsibilities of the deceased parent is one of the tests of attainment of orasa status. When the question is what amount of help must be given, one must see what amount of help

was asked for or might reasonably be required in a particular case. If a son is ready and willing to help in the acquisition of family property though not required to do so, or if he complies with requests to do so within the limits of his ability and in good faith, he has shown the degree of competence required (84).

Another requisite laid down in some of the Dhammathats is that of 'living together'. Sections 36 and 37, and 40 and 41 of the Digest contain provisions regarding claims to partition by sons and daughters living apart from the family on the death of the father and mother respectively; of these the Dhammathat-Kyaw in sections 37 and 40 refers expressly to the eldest child, the complete extract being given in section 36. According to this extract, the orasa is permitted to retain his or her thinthi, but gets nothing more; moreover the status of orasa is accorded to a younger unmarried child living under the parental roof (85). This rule is traceable to an old usage whereby children, on marriage, set up separate houses and taking away a portion of the family goods, "entered into new partnership with consorts taken from other families (86)." As in regard to other rights separate residence is not now-a-days,

(84) Daw E v. Maung Aung Thein, (1941) Rgn.L.R.665 (F.B.).
(85) Digest, I, 64.
(86) per Jardine, J.C., Maung Po Lat v. Mi Pobe, (1883) S.J.212 at page 213; see also extract from Maine's, "Early law and Customs" on page 214.

generally speaking, regarded as a disability. In Kyi Hlaing v. Ma Htu (87), a judgment, largely based on the texts given in sections 36 and 37 of the Digest, dismissing an orasa son's suit against his mother for a quarter share on the ground that he was living separately from his mother, was set aside by Hartnoll, J.

In the case of Ma Hla U v. Maung Shwe Yin (88), it was held that an orasa daughter is not disentitled to her quarter by reason only of her living separately from her father and her failure to assume the duties of the deceased mother in the family. May Oung, J., further said (89),

"Conjoint residence is also demanded by some Dhammathats: vide those set forth in sections 36, 37, 40 and 41 of the Digest, Volume 1. It is noticeable, however, that the Manukye does not appear in any of these sections. No doubt, in its origin, the rules regarding the orasa's one-fourth depended to some extent on his or her residence with the family and performance of the duties of the deceased parent, but this requisite seems to have been dropped in most of the latest Dhammathats. At any rate, the modern disregard of separate residence as a

(87) (1914) 8 L.B.R.189.
(88) (1923) 1 Ran.370. Followed in Ma Aye Yin v. Ma Mi Mi, (1929) 7 Ran.569; Daw E v. Mg.Aung Thein, (1941), Rgn.L.R.665(F.B.).
(89) (1923) 1 Ran.370 at 371.

disqualification for inheritance in the case of blood relatives, is in my opinion, a circumstance which applies to the claim of the orasa no less than to those of the children on the death of both parents."

5. Vesting of the orasa child's share.

The special share of the orasa child vests, if at all, in the case of a son, on the death of the father, and in the case of a daughter, on the death of the mother (90).

The status of orasa is acquired as soon as the child has fulfilled the requirements specified in the preceeding section; but a vested interest in the property of his or her parents is only obtained by the orasa child upon the death of the father or mother as the case may be (91).

Where the share has ~~all~~ once become vested, the orasa child cannot be deprived of his interest by the death of the surviving parent before he has sought to enforce his claim, and if he dies before claiming his share, it passes to his heirs or legal representatives (92).

---

(90) V.T.Arunachellam Chetty v. Mg.San Ngwe, (1924) 2 Ran.168; Ma E Mya v. U Pe Lay, (1925) 3 Ran.28; Ma Kyu v. Mg.Shwe Kya, (1928) 6 Ran.318.

(91) The statement in Mg.Kyin v. Ma Kya Gaing, (1930) 8 Ran.396, that the interest of the orasa child becomes vested upon the attainment of that status would appear to be inaccurate; see O.H.Mootham, Burmese Buddhist Law, 100.

(92) V.T.Arunachellam Chetty v. Mg.San Ngwe, (1924) 2 Ran.168; Ma Kywe v. Mg.Shwe Kya, (1928) 6 Ran.318.

Where, however, the orasa dies before his or her share has become vested, the children of such orasa do not acquire the interest of the latter, but an independent right to a share in the estate of the grandparent (93).

The orasa child has a period of twelve years from the date upon which his share became vested within which to assert his claim (94). Where the claim is in respect of a share in immoveable property, the orasa child's interest becomes extinguished by virtue of the provisions of S.28 of the Limitation Act at the expiration of that period (95).

The orasa child is entitled to mesne profits on the share to which he may be entitled from the date on which he obtained a vested interest therein (96).

6. Only one orasa child.

If a child having once acquired the status of orasa, dies, no other child can attain the position of orasa.(97). If the eldest competent child dies before having attained the status of orasa, the orasa-ship will pass to the next child who satisfies the conditions set out above governing the acquisition

---

(93) U Sein v. Ma Bok, (1933) 11 Ran.158;
Po Sein v. Po Min, (1905) 3 L.B.R.45;
and see Ma Hnin Yi v. Mg.Thin, (1940) Ran.32.
See also under 'Out-of-time grandchildren' supra.)
(94) Tun Tha v. Ma Thit, (1916) 9 L.B.R.56 (P.C.);
Ma Kyu v. Mg.Shwe Kya, (1928) 6 Ran.318;
See also under Administration, infra.
(95) Mg.Kyaw Za v. U De Bi, (1927) 5 Ran.125.
(96) Mg.Pan On v. Mg.Tun Tha, (1921) 11 L.B.R.292;
Mg.Po San v. Mg.Po Thet, (1925) 3 Ran.438.
(97) Tun Myaing v. Ba Tun, (1904) 2 L.B.R.292.

of orasa status (98).

Special difficulties in selecting the orasa arise (1) when a man has more than one wife, and children by all of them, and (2) when either husband or wife has married more than once in succession, and has more than one family.

The principle, deduced in Maung Sin v. Ma Thein (Kirkwood (a)) (99) that there cannot be more than one orasa in a family comprising a husband and his several 'superior' wives, is not borne out by the Dhammathats. While in theory, the solidarity of the family is maintained and provisions such as that, "if a man has several wives but only a son by one of them, the son shall be deemed offspring of all of them (100)", reminiscent of the rules of the Hindu Dharmasastras (101) are extant in the Dhammathats, the realities of a polygamous household are not overlooked; one of the several wives and her children may not lay a claim in another wife's payin and inherited property (102); and on the father's death the rights, primary and secondary, of the orasa son may be shared between the first-born son of the first wife and another son, who may be born of any wife. The distinction which in Thein Mg. (Mg.) v. Ma Kywe (103), Baguley, J. draws between the son who is entitled to a preferential share on the father's

(98) See para.4 (supra).
(99) (1922) 11 L.B.R. 220.
(100) Digest, I, 221.
(101) Manu, Chap.IX, 183.
(102) Digest, I, 291; Manugye, X, 37, 38.
(103) (1935) 13 Ran.412 at 445 (F.B.).

death and the son who is allowed to take upon himself the father's office and feudal rights, is clearly indicated in the Dhammathats which are cited at sections 118 and 286 of the Digest, Volume 1.

The incorrect and incomplete rendering of the texts in the official transaction has, however, led two of the Learned Judges who dealt with Mg. Thein Maung's case to draw conclusions not warrnated by the texts. Thus, Mya Bu, J. was led to distinguish between the provisions of section 38, Book X of Richardson's Manugye and the extract from Manugye cited in section 118 of the Digest; and Ba U, J. was led to say that "the Dhamma is the only Dhammathat which definitely lays down that a son who is competent to assume the duties of his father shall not only be entitled to succeed to his father's office but shall also get an orasa share out of his parental estate irrespective of the fact whether he is by the first, second or third wife."

The Manugye extract cited at section 118 forms part of the text given in extenso at section 286 of the Digest; and the latter is but a variant of the text at section 38 of Book X of Manugye. U E Maung (104) points it out that Richardson's text is corrupt; the words, ဖေဖေး၌ ဖေဖေးကြီး ပြစ်ကျေဖေ ဆို တဲ့ ၏။ do not, in the context, make sense; the words, ဖေဖေး၌ သားကြီး ပြစ်ဝေ ဆို တဲ့ ၏။ favoured by the Digest gives coherence to the text as a whole. Moreover, the rule as given in the Digest is

(104) Burmese Buddhist Law, 166.

consistent with that of Amwebon; and as Amwebon closely follows Manugye in its provisions on inheritance, consistency with the former is cogent evidence of the purity of the text in the Digest. The relevant portions of the Manugye text at section 286 may be rendered, thus:-

"The law relating to partition on the death of a husband, whose wives live in the same house and eat out of the same dish is as follows:- A man has wives taken first, second and third in order of time; if any of them has payin or property inherited after marriage from her parents, let her keep it; kanwin property of each wife also shall be retained by her; if all these wives have sons, let the (eldest) son by the first wife be the tha-gyi; and let the son, who is known to the officials (be he born of any wife) assume the father's office."

This makes it clear that the "Tha-gyi" who takes a preferential share is not necessarily the son who is known to the officials. The Dhamma text makes the matter clearer; it provides that if the first born son by the first wife is known to the officials and can bear the responsibilities of office, his claim to his father's office is superior to that of other sons; only if he is incompetent, is another son to assume the father's office; but in any event, the first born son of the first wife "shall get the father's personal property and take out of the estate his share as an orasa."

At the present day, when heriditary offices and feudal rights are extinct, the distinction, once drawn between the son who is entitled to a preferential share on the father's death and the son who succeeds him in his office, becomes insignificant. And in a polygamous family, as in a monogamous family, there cannot be more than one orasa under modern conditions (105). The Dhammathats insist on the superior claims of the child of the first marriage (106); and polygamy though still legal at the present day is merely tolerated. Hence, the first-born child by the first wife is the orasa in the family of a polygamous father, assuming of course, that the child attains majority.

While the Dhammathats declare that the first-born son of the first wife shall be entitled on the father's death to the orasa share, they do not state explicitly the nature of the estate in which such share may be claimed. It is clear from the provisions of sections 286 and 392 of the Digest, as also sections 232 and 233 of the Attasankhepa that the claim does not extend to the payin and inherited property of the other, whether the wives are living in the same house or separate. And where the wives are living separate from each other, it may also be deduced from section 232 of the Attasankhepa and from

(105) U E Maung, Burmese Buddhist Law, 168.
(106) Ibid, 168;
Digest, 1, 286.

section 392 of the Digest (the texts in the latter purport to deal with the estate of a polygamous Brahmin husband but as is apparent from the Manugye, XII, 3 to 28, the principles are of universal application) that what has been exclusively acquired with one wife is that wife's property vis-a-vis the co-wives and their children, and in that property the child by another wife can have no share, even if it is the orasa. The Dhammathats which recognise the right of the first born child of the first wife to claim an orasa share state at the same time that each wife takes without any interference by any other wife or her children these various clases of property; it is submitted that in the face of such explicit direction the contention that the orasa as representative of his deceased father takes a share in the excepted property cannot prevail. It is further submitted that this contention cannot even be put forward where the orasa is a daughter. Thus in Maung Thein Maung v. Ma Kywe (107) a Full Bench of the High Court (Mya Bu, J. dissenting) has held - and it is respectfully submitted, correctly - that where a Burmese Buddhist, having two wives and having children by the first and none by the second, lived and worked with the second, the orasa son, born of the first wife, is not entitled on his death to claim a share in the property jointly acquired by the father and the second wife.

(107) (1935) 13 Ran.412 (F.B.).

There has been no adjudication so far on the claim to orasaship of a child by a second or other subsequent marriage of a parent, who has been married more than once in succession. It is clear from the recognition of the pubbaka child's right to be an heir in the step-parent's estate that Burmese looks upon the pubbaka as a member of the family of its parent and step-parent; a senior child of the family necessarily excludes the junior from the orasaship. Further, though no positive rule denying a child of a marriage subsequent to the first the status of the orasa appears in the Dhammathats, it may legitimately be inferred from the texts dealing with partition on the death of the twice married parent (108) that the compilers of the Dhammathats did not contemplate the possibility of such a child being the orasa (109). An orasa, as appears from sections 30 and 33 of the Digest, takes a fourth of the entire parental estate (110); the Dhammathats give to the children as a whole of the second marriage a fourth of the hnapazon only of their parent. In the payin of their parents, the children of the second marriage have no part; even where the twice married father had no child by the first marriage, it is the mother who takes his entire payin (111).

(108) Digest, 1, 229, 230.
(109) U E Maung, Burmese Buddhist Law, 172.
(110) See also, Mg. Pan On v. Mg. Tun Tha, (1921) 11 L.B.R.292.
(111) See the Vilasa text in Digest, 1, 229.

7. Limitation on the Orasa child's general right of inheritance.

The orasa who has taken the quarter share on the death of one parent is not entitled as against the kanitha (112) children to participate in the division of the estate on the surviving parent's death, except possibly when there are no other children (113).

The right of the orasa is not one which he or she is bound to exercise; but it is not a mere option to elect. It is an option to take a definite one-fourth part of the estate. In a family of less than four children it might be to the orasa's advantage to await the re-marriage or death of the surviving parent and then to take the whole, a half or a third instead of a fourth. Since, however, it is a vested right, the orasa may, if the surviving parent dies within the period of limitation for his claim for his orasa share, then elect whether he would come in as one of the children taking his or her share as such (not necessarily that of an orasa) to which he or she is then entitled under the rule of partition applicable in such circumstances on the death of the survivor or as the orasa on the death of the predeceased parent (114).

(112) i.e. a younger child.
(113) Mg.Po Mya v. Ma Hla, (1929) 7 Ran.409.
(114) Mg.No Ø v. Maung Po Thein, (1923) 1 Ran.363;
Ma E Mya v. U Pe Lay, (1925) 3 Ran.281;
U May Oung, Leading Cases on Buddhist Law, 252.

It was held in U Tauk Ta v. Ma Ohn Yin (115) that the daughter and only child of a Burmese Buddhist who had attained the status of orasa before her mother's death and had not claimed her share as orasa on her mother's death, was entitled to the shares of both of an eldest child and of kanitha children, and therefore to claim on her father's re-marriage, of one half of the estate existing at the date of re-marriage. The eldest child, whether orasa or not, on the re-marriage of the surviving parent becomes entitled to a one-fourth share of the estate held by the surviving parent at the time of re-marriage, if such child, qua orasa, has not already taken the orasa's share. The re-marriage gives the eldest child a fresh right, and a new period of limitation (116).

---

(115) (1939) Rgn. ~~L.R.~~ 217.
(116) Ibid.

CHAPTER XV

PARTITION.

1. When the right to Partition arises.

Partition is here used in its general sense of division or separation of interests in property. The estate of a Burman Buddhist does not, on his death, vest in his heirs collectively, but each of the latter obtains a vested interest in a definite fraction of the estate, Strictly speaking, therefore, an heir is not entitled to maintain a partition suit; in the strict sense, it is an administration suit (1) but proceedings by an heir for his share in the estate of the propositus are usually in Burma described as a partition suit.

An heir is entitled to claim partition on:

(1) the death of the person to whom he or she is the heir, either solely or in conjunction with others.

(2) the remarriage of his or her surviving parent (2).

The commonest occasion giving rise to a claim for partition will obviously be the death of the person owning the estate which it is sought to partition. Of the possible claims arising under this head, three call for further mention. These are the claims of the most frequent occurrence, and arise either on -

---

(1) Mg. Ba Tu v. Ma Thet Su, (1927) 5 Ran.785, affirmed on appeal: Civil 1st Appeal No.294 of 1927, High Court, Rangoon.
(2) Ma Toke v. Ma U Le, (1923) 1 Ran.487;
Ma Thein v. Ma Mya, (1929) 7 Ran.193.
Ma Shwe Yu v. Ma Kin Nyun, (1929) 7 Ran.240.

(a) the death of a parent,

(b) the death of the surviving parent subsequent to his or her remarriage, or on

(c) the death of a step-parent (3).

The nature and extent of the estate to which an heir may be entitled, or in which he may be entitled to a share of inheritance depends upon the occasion upon which the claim is made. Thus where the claim arises upon the death of a husband or wife, there having been no second marriage, the estate to be divided will be the property of the marriage as at the date of death (4), and it makes no difference whether the claim arises upon the death of one spouse leaving the other surviving, or upon the death of the survivor (5).

In the case of claims arising upon the death of a surviving parent subsequent to his or her remarriage, the estate to be divided will consist of the property of the second marriage as at the date of death, including therein such property of the first marriage as was brought to the second by the surviving parent (6). Hence any alienation of the joint property of the second marriage by the step-parent after the death of the parent and before partition is not binding upon the step-child (7).

(3) O.H.Mootham, Burmese Buddhist Law, 86.
(4) Mg. Sein Shwe v. Mg. Sein Gyi, (1934) 13 Ran.69(P.C.).
(5) In re Ma Sein Tan v. Ma Son, (1915) 8 L.B.R.501 (F.B.)
(6) Ma Nwe v. Ma Sai Da, (1929)7 Ran.578.
(7) Mg. Po Aung v. Mg. Kha, (1928) 6 Ran.427 at 455(F.B.).

In the case of claims arising upon the re-marriage of a surviving parent, the estate will be that of the surviving parent as at the date of re-marriage (8).

2. Effect of Partition.

When kanithas (9) partition with their surviving parent on his or her re-marriage, they retain no future right in the share taken by the surviving parent to his or her new family (10). When one of a married couple dies and the survivor partitions the joint estate with his or her orasa and kanitha children and remarries taking his or her share with him or her, the children of the first marriage cannot claim from their step-parent any property which their parent took to his or her subsequent marriage (11). When on the re-marriage of the surviving parent partition of the joint property of the parents is effected between the surviving parent and the kanithas, such children cannot claim any further share in the lettetpwa of their surviving parent and the step-parent (12). On a second marriage it is open to a father to satisfy the claims of his children by the first marriage by effecting a partition at once so that the children of the first marriage may have no claim to inherit on his death (13). An heir who has obtained his share of

(8) Ma Shwe Yu v. Ma Kin Nyun, (1929) 7 Ran.240.
(9) i.e. younger children.
(10) Maung Shwe Bon v. Maung Pu, (1916)9 B.L.T.97.
(11) Ma Thaung v. Ma Than, (1923)3 B.L.J.333 (P.C.)
(12) Ma Toke v. Ma U Le, (1923) 1 Ran.487.
(13) Ma Htay v. U Tha Hline, (1924) 2 Ran.649.

inheritance on the re-marriage of his surviving parent is not entitled, on the death of that parent, to claim from the step-parent a share in either the property of the second marriage(14), or in the property inherited by the step-parent between the two marriages (15).

The above decisions do not establish a general rule that acceptance of a share of inheritance is in every case a bar to a subsequent claim to inherit because what is a bar to a claim as against the step-parent to a share of inheritance as heir of the deceased parent is not necessarily a bar to claim to inherit as heir of the step-parent herself. Thus step-grandchildren, who have made a partition with the step-grandparent upon the death of the grandparent are not thereby debarred from being heirs of the step-grandparent (16).

If upon the happening of a certain event one of several co-heirs alone claims and obtains his share in a particular class of property, the share to which the remaining co-heirs will be reduced, not by the amount of the share already distributed, but by the share to which the first co-heir would have been entitled at the subsequent distribution if he had not already received his share (17).

Thus, if a man with two children remarries after the death of his first wife, the children of the first marriage may sue

---

(15) Ma On Thin v. Ma Ngwe Yin, (1929) 7 Ran.398.
(16) Mg.Mya Tin v. Mg. Paik San, (1929)7 Ran.459.
(17) O.H. Mootham, "Burmese Buddhist Law", 89.

for partition either upon the re-marriage, or upon the death of the father, or upon the death of the step-mother. If the claim is made upon the death of the father, the share to which they will be jointly entitled in the hnapazon property of the second marriage (assuming there are children of that marriage) is one-eighth. If the claim is postponed until the subsequent death of the step-parent, the share to which the two sons would be entitled in the same class of property would be one-third. Suppose, however, that one of the children of the first marriage claims his share upon the father's death, while the other elects to wait until the step-mother's death. There is no difficulty over the first son's share, which will be half of one-eighth or one-sixteenth, and upon satisfaction of his claim he will have no further interest in the estate. In these circumstances will the share of the second son, upon the step-mother's death, be one-third, or one-third diminished by the amount received by the first son, or one-half of one-third, that is one-sixth? The question arose in the case of Maung Po Aung v. Maung Kha(18), in which the Court held that the latter method of calculation is correct. It is because the one-eighth share claimable on the death of the father must be held to be equivalent to a one-third share claimable at a later stage on the death of the step-mother, and it does not seem to be equitable to the step-mother's own family to deprive them of the whole one-third share now less only a one-sixteenth in spite of the fact that the

(18) (1928) 6 Ran.427 (F.B.).

estate has already lost what is now equivalent to a one-sixth part of it.

"It is impossible", said Brown, J., "to be entirely logical in such a case, but it seems to me more equitable to hold that Ma On (the first claimant) has already received what is now equivalent to a one-sixth share of the estate, and that her brother Maung Kha is therefore entitled only to the one-sixth share remaining of the one-third which his branch of the family is entitled to claim" (19).

It must, however, be observed that this method of calculation has no application if the property the subject of the second claim is property in which the earlier claimant did not, and could not, acquire a share. Thus in circumstances very similar to those in the preceeding illustration, but in which the first claim was made upon the re-marriage of the surviving parent and was in respect of the deceased parents' payin property, it was held (20) that in ascertaining the remaining heir's share, upon the death of both parents and step-parent, in the hnapazon and lettetpwa of the second marriage, no deduction was to be made in respect of the amount previously obtained by the first claimant.

3. Partition on the Death of a Spouse.

It is a fundamental principle of the Buddhist Law of inheritance that the wife shall inherit from the husband and

(19) Mg.Po Aung v. Maung Kha, (1928) 6 Ran.427(F.B.)
(20) In Mg. Po Zaw v. Mg.An, (1939) Ran.L.R.83.

the husband shall inherit from the wife (21). On the death of a husband or wife without children the survivor succeeds to the whole of the deceased's estate including the right of the deceased to a share in the undivided ancestral property. The survivor can enforce partition and obtain the deceased's share (22). The above rule, is, however, subject to exceptions.

In Maung Ohn Khin v. U Nyo (23) it was held that where a Burman Buddhist lived with his mother, who was in possession of the family property inherited from her deceased husband, and the son died leaving no issue, the mother and not the childless wife of the deceased was his heir in respect of such property and that it would be immaterial whether the son had or had not a vested interest in such property.

This exception is based on the provisions of the Manukye, Book X, Section 28, which is as follows:-

"In case the parents and their children, sons and daughters-in-law are living together, if a son or a daughter dies, the two laws by which their property is shared by the son or daughter-in-law (relict of the deceased) and the father and mother-in-law are these: If the daughter dies before she has any family, let the son-in-law have all the property, animate or

(21) Digest 1, sections 374,375; Ma Gun v. Ma Gun, (1874) S.J. 33 at 34; Mi Pyu v. Mi Bon Dok, (1874) S.J.35.
(22) Mg.Waik v. MgNyein, (1897) II U.B.R.(1897-1901) 416.46. Ma Sein v. Tun Ba (1919)12 B.L.T.79.
(23) (1931) 10 Ran.124.

inanimate, which was given to him at the time of marriage; let him have also all her personal chattels, and all property actually in possession, the parents of the deceased shall have no share in these; nor shall the son-in-law, though he demands the wife's inheritance of her parents, have any right to obtain it. Besides this, he shall not recover any of his wife's property actually in the possession or keeping of her parents; they shall retain it. But if it has been placed in their charge after the marriage, the parents and son-in-law shall share it equally between them; this is said when the (young couple) have no family. If there be any children, they shall inherit the property left by their grand-parents. Thus the lord recluse said.

In another case: If the woman shall live with her husband in his parent's house and the husband shall die, let the law be the same as above, that is to say, if there be no children born to them. If there be any children, let them inherit the grand-parent's property."

The above decision was followed in Ma Aye Tin v. Daw Thant (24) and it was held that the rule has no application in the case of a married couple in enjoyment of payin property though they may be living with the parents who manage the property for the benefit of the couple because each spouse has a vested interest to the extent of one-third) in the payin property brought by the

(24) (1940) Ran.L.R.572.

other spouse to the marriage, that is to say, property which has passed into common enjoyment though it may be in the custody or keeping of the parent.

It will be observed that the rule laid down in this section is concerned only with a division of property between parents in-law and a son or daughter-in-law; and that it has no application unless (1) the younger couple are childless, (ii) live with the husband's or wife's parents, and (iii) the property the subject of division is property of the deceased which is not only in the possession of the parents at the time of death, but has been in their possession during the whole period of the marriage - property of the deceased placed in the parents' charge after marriage being subject to a different rule (25).

In Ma Pwa Thin v. U Nyo (26) it was held that the doctrine laid down in section 28, book X of Manugye, ought not to be extended by analogy or otherwise and that it did not apply to the property of a child who was living separately from his mother.

In addition to the above exceptions, a second exception would appear to be created by the provisions of Manugye X, 29 which provide that, if a child lives separately from his brothers and sisters, but with a parent, and the child dies leaving a

(25) O.H. Mootham, Burmese Buddhist Law, 104.
(26) (1934) 12 Ran.409.

spouse surviving, the parent is entitled to a one-third share in the child's property if the child has offspring, and to a one-fourth share if there are none. The decision in the case of Mi San Hla Me v. Kya Tun (27) was stated to be founded on this province, but it is submitted erroneously, as it would appear that, in that case, the child was unmarried.

4. Partition between Surviving Spouses.

Where a polygamous husband dies leaving more than one widow, the general rule appears to be that the surviving widows share equally in the husband's property (28). Thus, in the case of hnapazon property which is wholly acquired prior to the taking by the husband of the second wife, the first wife's share will be three-quarters, being the half share in the property to which she acquired a vested right upon its acquisition, and a moiety of the remaining half share therein which belonged to her husband and which, upon his death, devolved upon both wives in equal shares (29).

In the case of inherited lettetpwa, it was held in Ma Gun Bon v. Ma Me Mi (30) by Pratt J., that though at Burmese Buddhist Law, the husband has a vested share in the inherited property of his wife, on his death his other wives do not take any interest

(27) (1894) P.J.116.
(28) Mi Ka v. Mg.Thet.(1873) S.J.6.
(29) Ibid.
(30) (1927) 5 Ran.448.

in that property; it reverts to that wife, whose inherited property it originally was. This view would appear to be in conflict with the decision in C.T.P.V.Chetty Firm v. Maung Tha Hlaing (31) where it was held that as soon as a person dies his heirs at the time under Burmese Buddhist Law become entitled to his estate and when a husband or wife inherits property after marriage, the other party acquires a vested interest in the property from the date on which it is inherited. It is submitted that the view expressed by Pratt J., in Ma Gun Bon v. Ma Me Mi (32) is unsound.

The general rule applies, of course, only where the widows are of equal status; if one of the widows had only the rank of an inferior wife a different rule comes into operation.

5. Partition on the death of Husband and Wife within a short period of each other.

It was held in U Po Tha Dun v. Maung Tin (33) that when a husband and wife die childless within a short period of one another, the relatives of the husband and the wife respectively succeed each to a half share in the joint estate of the deceased couple, irrespective of the nearness of the relationship on the one side as against the other. Thus the brothers and sisters of the wife will not exclude nephews and nieces of the husband. This rule is based on the analogy of the rule in section 308 of the Digest, volume I, which appears to have been

(31) (1925) 3 Ran.322 (F.B.)
(32) (1927(5 Ran.448.
(33) (1930) 8 Ran.480.

first intended to regulate the succession where the order of death was not ascertainable. It has been extended to the case where the interval is short enough for the estate to be regarded as retaining its joint character (34).

The trial Court in Ma Pwa Shin v. Ma Gale (35) was of the opinion that the method of division laid down by Manugye (36), that if a couple die within a short time of each other leaving no direct descendants, their 'six' relations inherit to the ancestral property, ought to be extended by analogy to the case of property inherited from collaterals during coverture. But, on appeal, it was pointed out by Mosely J., on the authority of Ma Pwa Thin v. U Nyo (37), that special and exceptional rules such as that in Manugye X, 56 should not be extended beyond the cases actually covered by them except where it is necessary by implication to hold that heirs who exclude parents or uncles and aunts are entitled to the same rights as they. It would further seem that it is only property inherited from the parents which is to go solely to the relatives of the spouse who had it. It was held that in cases where husband and wife die within a short time of one another and property has been inherited during marriage from collaterals by one party only, it should be treated not like property inherited from parents, nor as jointly

(34) Ma Pwa Oh v. Ma Lay, (1922)11 L.B.R.376; Ma Ein v. Tin Nga, (1915)8 L.B.R.1 (Dissented from on another point in Mg.Kun v. Ma Chi (1931) 9 Ran.217 (F.B.).
(35) (1940)11 Ran.L.R.753.
(36) Bk.X.sec.56 (37) (1934)12 Ran.409.

acquired property, but on the same footing as payin property, or as inherited lettetpwa in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party.

It is necessary to consider what amounts to a short interval within the meaning of the special rule contained in section 308 of the Digest, volume I. The essential words in Manukye are:

ဒွစိ ခို: သဘ: တို့ ၈ ဝ သ ပြင်: အ ဂ ဉ် ဒ ဂ ါ: ဇ ခွ ာ ဒ်: ၊ သ ဝ ဒ်: မ ဂ ာ: ၊
တ ဒ် ဂ ါ: ဝ သ ဆ ည်: လ ၊ ဒွ စ ်: ၊ ခ ဖို ဒ်: မ ဂ ္ဂ ာ: မ ီ ဖ ွ ဒ် က ၊ ခို: ဂ ာ ဝ ဝ ယ ျ ၊ ကြ ဝ ေ ။

Richardson has translated these words as follows:-

If they both die about the same time, so that it is not clear who is the survivor, or if it be known, but the months or years not ascertained, let the relations of both inherit according to consanguinity.

Maung Kin J. (38) pointed out that this translation is not quite correct, and according to him the following is a correct translation containing no gloss whatsoever:-

"In the matter of the two dying, (if) it is not certain which died first and which later, (or) though it is certain (but) month or year not having elapsed (intervened), let the next-of-kin (of both) divide (share)".

Extracts from the following Dhammathats contain the same or practically the same words:-

Dhamma, Dâyajja and Amwebôn. The extract from Manu is

---

(38) Ma Pwo Oh v. Ma Lay, (1921)XI L.B.R.376 at 377.

as follows:

If a month does not intervene but they die one shortly after the other as if they died together, let the relations of both share equally.

The matter was first considered in Ma Kadu v. Ma Yon (39). In that case the interval was one of two months and seven days but it appears to have been assumed that this would be a short interval. In May Oung's Leading Cases on Buddhist Law at page 196 the question is considered and it is stated that Manugye and other texts collected in section 308 of the Digest indicate that the rule is applicable where the husband or wife dies before the lapse of a month or a year.

Robinson J., in Ma Myin v. Ma Toke (40) held that a period one month and twenty days was too long, and expressed the view that any period over one month was not a 'short period'. His authority for this is the indication given in the extract from Manu's quoted above. Maung Kin J., in Ma Pwo Oh v. Ma Lay(41) pointed out that Manu Dhammathat speaks of a short interval first and gives the period which it considers to be a short interval and hence in his opinion an interval of two months and fourteen days is too long a period to constitute a short interval to justify the application of the rule.

It is submitted that no definite time can be stated as

(39) (1905)II U.B.R. (1904-6)Buddhist Law, Inheritance 7.
(40) (1920) 10 L.B.R.288.
(41) (1922)II L.B.R.376.

constituting a 'short interval'. It is clear that the provision is an exceptional one intended only to meet a special case, and therefore, all that can be said is that the interval must not be so long as to interfere unduly with the ordinary rule of succession.

6. Partition on Death of a Parent.

(a) Orasa's Right.

Burmese Buddhist children have no interest in the property of their parents while both parents are alive; there can be no partition during the lifetime of both parents. During the lifetime of both parents the children are only entitled to what the parents choose to give them (42). The orasa can claim partition on the death of the parent of the same sex, but the other children cannot claim partition with the surviving parent on the ground of the death of one parent. The general rule is that, on the death of either husband or wife, the survivor succeeds to the whole of the estate of the deceased to the exclusion of all the children of the marriage except the orasa (43).

(b) Exceptions.

Where a man has two or more wives at the same time the children of a wife, and not the husband, are on her death entitled to her estate (44).

---

(42) Digest I, section 9.
(43) Mg.Hmon v. U Cho Pongyi, (1893) II U.B.R. (1892-6) 397.
(44) Mg.Aung Pe v. U Tun Aung Gyaw, (1930)8 Ran.524; Ma Ni v. Ma Shwe Pu,(1930)8 Ran.590.

In Maung Aung Pe v. U Tun Aung Gyaw (45), it was held that where a Burmese Buddhist has two wives, the children of one wife are entitled on her death, to claim partition, on the same basis as if the father had remarried, in property inherited by his mother from her parents. Baung Ba, J. pointed out that it is a very significant fact that in none of twenty-one Dhammathats is there any indication of what the respective shares of the surviving parent and the children should be. Such omission could not be accidental. Had the Dhammathats intended to treat the children as co-heirs of their surviving parent they would certainly have laid down their share as they did in the case of an orasa. Therefore, it is reasonable to hold that the Dhammathats do not, in the instant case, envisage any special rule differing from the general rule of partition applicable to ordinary joint property including divided ancestral property. According to this view the share should go first to the surviving parent (of course subject to the rights of the orasa) and only failing such parent to the children. This view appears to be supported by Manugye which says, "A son dies after the parents but before partition of inheritance.... the wife or children shall receive the share to which the deceased is entitled, because he dies after the parents." The Burmese jurists cannot have intended to encourage polygamy; and they

(45) (1930) 8 Ran.524.

could not have been actuated by a desire for revenge nor were they blind to the interests of the deceased spouse and his or her children. The law treats a Burmese Buddhist couple as partners, each having a vested interest in the joint property. There seems to be nothing objectionable to a man's remarrying after the death or divorce of his first wife, but it seems to be immoral for a man to marry another woman during the life-time of that wife. The real reasons for allowing partition on remarriage be in the apprehension that the step-parent will not have due regard to the step-children's interests, and may deal with the property to the latter's detriment. The step-parents even without committing actual waste, may gradually convert payin into lettetpwa."(46) It is not only equitable but also desirable to extend the principles and to provide for similar protection in such cases as the present. Such extension will not offend against the Dhammathats which are by no means exhaustive, but on the contrary may have a beneficial effect on society by discouraging the practice of polygamy which is nowadays, being looked upon with disfavour especially among the educated classes. It was therefore held that the children of the deceased wife were entitled to claim partition against his father on the same basis as if he had remarried. Thus, in property which was inherited by the deceased mother from her parents, the children's share is two-thirds.

(46) Ma Toke v. Ma U Le, (1923) 1 Ran.487

Baguley, J., who was a party to this decision agreed and observed (47), "on principle I see no reason why a right of partition should not exist under the Burmese Buddhist Law. If the father married one day after the death of his wife, the children would get their right of partition. Why should they not have a right of partition if he hurried matters to the extent of marrying one day before the other wife died?"

In Ma Ni v. Ma Shwe Pu (48), a case decided at almost the same time but by a differently constituted Bench, it was held that where the wives resided in separate households, the property brought to the marriage by the deceased wife, and all property inherited by her during her marriage, constituted her separate estate; and that, consequently upon her death the whole of such property passed to her children. The Court relied upon certain dicta in Ma Hpan v. Ma Ngwe Sa (49) and the decision in Ma Khin v. Kin Kin (50), in which Brown, J., held that although property inherited by one of the wives of a polygamous marriage constituted lettetpwa of the marriage for certain purposes, yet upon her death it devolved in its entirety upon her children.

While this second exception, namely, where a man has two or more wives at the same time the children of the wife who dies and not the husband, are on her death entitled to her estate, appears well established, doubt remains as to what,

(47) Mg.Aung Pe v. U Tun Aung Gyaw, (1930) 8 Ran.524.
(48) (1930) 8 Ran.590.
(49) (1929) 7 Ran.526.
(50) (1921) 4 U.B.R.11.

in such circumstances, constitutes the 'estate' of the deceased wife. In Mg.Aung Pe's case (51), the children were held entitled to partition on the same basis as if the surviving parent had remarried i.e. they took the deceased parent's share (i.e. two-thirds of the lettetpwa inherited by their deceased's parent). In Ma Ni's case (52) it was held that the whole of the inherited lettetpwa of the deceased wife passed to her children. It is submitted that the view that all property inherited by one of several wives during coverture remains her separate estate is in conflict with the decision of the Full Bench in C.T.P.V.Chetty Firm v. Maung Tha Hlaing(53), where it was held that when a husband or wife inherits property after marriage, the other party also becomes entitled at the same time to an undivided one-third portion. It is submitted that the view expressed in Ma Ni's case (54) is erroneous.

7. Partition on death of Surviving Parent who has not remarried.

Under the fore-going heads it has been seen that children have no interest in the property of their parents while both father and mother are alive. The rights acquired, on the death of one by the survivor and issue of the marriage have also been described. It remains to consider the method of distribution

(51) 8 Ran.524.
(52) 8 Ran.590.
(53) (1925) 3 Ran.322(P.C.).
(54) 8 Ran.590.

when on the death of both parents the children are entitled to partition the parental estate among themselves.

The whole of the estate of a surviving parent who has not remarried is, upon his or her death, divisible between:

(i) the surviving children of the marriage and

(ii) the children of any child of the marriage who predeceases the surviving parent.

Grandchildren falling within class (ii) above are known as 'out-of-time' grandchildren, and the shares to which they are entitled has been considered (55). Grandchildren not falling within class (ii) are not heirs of their grandparents.

If there are neither children nor grandchildren entitled to take, then the surviving parents' estate will pass to the person or persons next in order of succession.

The Dhammathats are unanimous in prescribing some form of graduated division even among children of the same couple. The eldest son and the eldest daughter are, in ordinary circumstances, treated with peculiar favour (56), while, in some cases, a youngest child obtains certain preferential rights (57). Distinctions are also made between children who live together with the parents and those who live apart (58), and some texts

(55) see under 'out-of-time' grandchildren.
(56) e.g., Digest, I, section 60, 99.
(57) Digest I, section 65: Wagaru, sections 2 & 3, in Jardine's Notes on Buddhist Law, V
(58) Digest I, section 64.

regard physically defective children in an unfavourable light (59). Of all the rules, the most general are the following:-

1. Where there are daughters only, the eldest first takes the mother's clothes and ornaments; the bulk of the estate, together with the father's clothes and ornaments should be divided into twenty portions and the eldest daughter takes one The remainder should again be divided into twenty portions and the second daughter takes one; and so on, three times, or, according to some, seven, or as many times as there are daughters. The ultimate residue is equally divided amongst all (60).

2. Where there are sons only, the eldest first takes the father's clothes and ornaments; the successive apportionment is here into ten shares. (61).

3. Where there are both sons and daughters, the eldest son takes the father's clothes and ornaments, the eldest daughter takes the mother's and the division is into fifteen shares (62)

These provisions are intended for cases where there are 'several' children, whatever that may mean. Further elaborate methods of division are given for different families, according as they are constituted, from two to fifteen in number (63).

But the Manugye eventually says (64) :-

(59) Digest I, section 110,111, Attasankhepa 180,181, Manugye, Book X, section 35, 36, 39.
(60) Manugye, Book X, section 13; Digest I, section 152, Attasankhepa, section 152.
(61) Manugye X, section 14(1); Digest I, section 151, Attasankhepa, 162.
(62) Manugye,X,14(2),Digest I,sect.153.Attasankhepa,section 162
(63) Manugye,X,sect.60,61,72. Digest I,sections 137-150;155-160 Attasansankhepa 163, 167, 227-282.
(64) Book X, section 81.

"Thus, again and again in the diverse, various and complicated cases described, partition has been effected in many ways. Children of the same parents in taking equal or graduated shares, must pay heed to the interest of their family. I will give an instance; it is just as, when a hen brings food, all the chickens get an equal share to eat."

The Dhammathats cited in sections 60 and 61 of the Digest, volume I, support the principle of equal division.

It does not seem that there has been any reported case in Burma in which in the absence of agreement any method of unequal division among children of the same parents has been adopted. Difficulties in the selection and application of the correct scale have, compelled the Courts to apply the rule of equal division. In Maung Po Lat v. Mi Po Le (65), as far back as 1883, Sir John Jardine was impressed with the equality sought by Buddhist Law, but the matter was not in issue. The case of Ma E Mya v. Ma Kun (66) decided by Burgess, J.C. in 1892 "is an instructive one as illustrating the comparative small regard paid to the technical rules of the Dhammathats, and the tendency in favour of equality in the distribution of inheritance." In Ma Gyan v. Maung Kywin (67), "it was agreed in the Courts below that the respective shares of the elder and younger

(65) (1883) S.J.212.
(66) (1892) II U.B.R.(1892-6) 102 at 109.
(67) (1895) II U.B.R.(1892-6) 176.

brother were to be calculated in accordance with section 163 of the Attasankhepa Dhammathat, 437ths and 292ths;" hence the final
729 729
Court did not go into the question. In Ma Po v. Ma Swe Mi (68) a case between two sisters, Burgess J.C. felt certain that "equality of sharing inheritance" was commonly in favour and practice throughout the country and that to give judicial sanction to the rule would probably make no innovation of the law; but he ordered additional evidence to be taken as to custom. The District Court reported, "there is considerable evidence that in this part of the country there is a custom of equal division, and that in divisions of inheritance made by arbitrators with the consent of the party's custom is followed and not one or any of the rules in the Dhammathats." Burgess J.C. said (69), "It seems to me therefore that when the rules are conflicting and uncertain; when there is no proof as to what Dhammathats ought to be followed or what rule ought to prevail; when it cannot be shown that a particular direction is a living rule and not merely a dead-letter, and when the circumstances of the cases are not such as are contemplated by the object of the rule, the Court may safely accept a custom which there is a reasonable amount of evidence to establish if such custom is consonant with equitable principles. In the present case the appellants have failed to show the observance of any fixed rule in the Dhammathats

(68) (1897) II U.B.R. (1897-1901)79.
(69) Ma Po v. Ma Shwe Mi, (1897)II U.B.R.(1897-1901)79.

and there are no means of telling which rule out of the different rules is strictly applicable; there is evidence that in practice the complicated and intricate and in some respects fantastic rules in the Dhammathats are not taken as a guide, but the principle of equality is followed; and the circumstances and relative positions of the parties disclose no grounds for making that difference between them in regard to their rights of inheritance which is at the most of the rule of succession to be found in the Buddhist text books". Thus a decision, limited in terms to the particular case before the Court, was given in favour of equality of division. In Maung Pan v. Ma Hnyi(70), where the division was between two sons and two daughters, it was hardly disputed that the shares should be equal.

Finally in Ma Kyi Kyi v. Ma Thein (71), it was definitely laid down that the principle of equal division, and sections 60 and 61 of the Digest were relied upon. Since then the law on this point has been settled.

The principle of equal division has been applied in the case of children (72), grandchildren (73), uncles and aunts (74), cousins (75), and nephews and nieces (76).

Where the co-heirs are related in the same degree to the

(70) (1897)II U.B.R. (1897-1901)104.
(71) (1905) 3 L.B.R.8.
(72) Ma Kyi Kyi v. Ma Thein, (1905)3 L.B.R.8.
(73) Mg.Po Thu Daw v. Mg.Po Than, (1923)1 Ran.316(F.B.).
(74) Kan Gyi v. Ma Pyu, (1912) 6 L.B.R.164.
(75) Mg. Ba Gon v. Mg. Pwa Thit, (1927)5 Ran.747.
(76) Ma Kin v. Mg.Po Myit, (1929)7 Ran.811.

propositus each inherits in his own right, and the division of the estate will be per capita and not per stirpes (77)

There is, however, one kind of property (Minbe) in respect of which it is probable that the eldest son or daughter should still have a preferential right, namely, property given to the father or mother by the government (78). The insignia of an order, a medal, a sword of honour, and the like, would not have a very high intrinsic value, but instances have occurred, wherein such property has been the subject of acrimonious dispute. They would come under the description of 'personal ornaments' of the parents, and, as such, should, it is submitted be awarded in accordance with the provisions of the Dhammathats (79).

8. Partition on the Remarriage of the Surviving Parent.

An heir is entitled to claim partition upon the remarriage of one parent after the death of the other (80); a claim is allowed on the happening of this event for the protection of the share of the children of the first marriage. Duckworth and Po Han, J.J., observed:-

"The real reasons for allowing partition on remarriage lies in apprehension that the step-parent will not have due regard to the step-children's interests, and may deal with the property to the latter's detriment. The step-parent even without

(77) Mg.Shwe Ye v. Mg.Po Mya (1925)3 Ran.464; Mg.Ba Gon v. Ma Pwa Thit, (1927)5 Ran.747

(78) Jardine's Notes I, 39.

(79) U May Oung, Leading Cases on Buddhist Law, 256.

(80) Ma Toke v. Ma U Le, (1923)1 Ran.487;
Ma Thein v. Ma Mya, (1929)7 Ran.193;
Ma Shwe Yu v. Ma Kin Nyun, (1929)7 Ran.240.

committing actual waste may gradually convert payin into lettetpwa (81)."

This gives rise to the question whether, on a second marriage while the first marriage is subsisting, the children of the first marriage could make the same claim for partition. This question has not been judicially determined but there would appear to be little doubt that such a claim, if made, would be allowed, for as Baguley, J., observed in the case of Maung Aung Pe v. U Tun Aung Gyaw (82): "If the father married one day after the death of his first wife the children would get their right on partition. Why should they not have a right of partition if he hurried matters to the extent of marrying one day before the other wife died?"

Taking first the case where the wife dies, leaving the husband and issue:- the widower is entitled immediately to three-fourths of the joint estate if there is a daughter capable of taking as orasa, and to the whole if there is no such daughter; sons and kanittha daughters have no claim (83). But if the father takes a second wife, the law laid down in the Dhammathats is as follows:-

(1) the eldest son must be given one-fourth of the mother's

---

(81) Ma Toke v. Ma U Lay, (1923) 1 Ran.487.
(82) (1930), 8 Ran.524 at 537; this observation was approved of by Goodman Roberts, C.J., in Mg.Theirn v. Mg.Nyo Sein, (1939) Ran.L.R.160.
(83) Manugye, Book X, section 2 and 3;
Digest, I, section 32, 33, 35.

personal belongings and one-farth of the estate, except the dwelling house, to which the father is entitled together with the remaining three-fourths; and if the eldest son is a minor, his share must be ascertained and kept apart (84);

(2) the eldest daughter's share, consisting of (? the residue of) the mother's personal belongings and one-fourth of the estate, must likewise be ascertained and kept apart since, presumably she is a minor; if she had attained majority, she would have been entitled to claim as orasa even if the father had remained single (85).

In the construction of these provisions on the Dhammathats, the following question demands an answer. Are the shares of the eldest son and the eldest daughter mutually exclusive, that is to say must the son or daughter be the eldest child to be able to claim the quarter share or is it sufficient if he or she is the eldest son or the eldest daughter? If the latter, the father will be left with one-half of the estate; and younger sons and daughters will have thus only the interest of the father in which they could inherit. They would be deprived of the inheritance in the estate of their mother, a result which could not have been intended by the writers of the Dhammathats.

Turning to the rulings, it will be noticed that the relation between sections 2 and 3 of Book X of Manugye, in this connection has not been fully considered, the reported cases dealing only

(84) Manugye, Book X, section 2; Digest, I, section 45.
(85) Manugye, Book X, section 3; Digest, I, section 45.

with the claim of the eldest son against his father on the latter's re-marriage. In Maung Seik Kaung v. Maung Po Nyein(86), the plaintiff was the eldest son of the defendant, who had married again after the death of the plaintiff's mother. There were daughters as well as sons of the first marriage, but no one besides the plaintiff had joined in the suit. On the authority of Manugye X, 2, uncontradicted by other Dhammathats, it was held by a Bench that when the father marries again, the eldest son, especially if he is the eldest child, can claim a one-fourth share of the general joint estate of the parents. This decision was approved of by a Full Bench in the case of Shwe Po v. Maung Bein (87), wherein the mother having died leaving the father and an only child, a son, it was held that the father, having contracted a second marriage, can dispose absolutely of only three-fourths of the joint property, the son being entitled to one-fourth, provided he claims his share within twelve years of the second marriage.

In the case of Maung Shwe Ywet v. Mg. Tun Shein (88), the eldest born child, a daughter, died at the age of nine, and the next born child, a son, died at the age of six, and the plaintiff was the eldest surviving child. On his father's re-marriage after the death of the mother, the plaintiff who was only sixteen years of age at the time of his mother's death, claimed a quarter share in the joint estate of his parents. Heald, J., made an exhaustive discussion of the Dhammathats and

(86) (1900) 1 L.B.R.23.
(87) (1914) 8 L.B.R.115.
(88) (1921) 11 L.B.R.199.

of the previous rulings. He pointed out that the recognised right of the auratha child to take the quarter share on the death of the parent is limited to cases in which that child is sufficiently grown up to take the place of the deceased parent, and therefore it would appear that if the child was not grown up the right to take the fourth share on the death of the parent could not arise. The right of the child, who is not sufficiently grown up to separate from the surviving parent, to have the one-fourth share segregated would seem therefore to be a different right from the ordinary right of the grown up auratha to take the fourth share on the death of the parent. It is true that there is no actual reference to age in the Dhammathats which prescribe Segregation. The phrase used in each case is, "if the child is not 'sufficient' to separate; but he (Heald J., does not think that the phrase can bear any other meaning than 'is not sufficiently old to separate', and the Burmese word, 'to be sufficient' is constantly used in the meaning of 'to be old enough'. He, therefore, said one is driven to the conclusion that although the writers of these Dhammathats, and particularly of Manugye, did not actually say in so many words that the right of the auratha to take the one-fourth share of the estate on the re-marriage of the surviving parent was a different right from that of the auratha to take a one-fourth share on the death of the parent, probably because there was in the older law books which they were reproducing no recognition of the right to take a share on re-marriage, nevertheless the right which they had in their minds, vaguely it may be, was not

identical with the recognised right of the auratha to take one-fourth on the death of the parent, and was probably a right, by that time well established by custom, allowing the eldest child, whether grown up or not to claim one-fourth of the estate on the re-marriage of the surviving parent, although he or she was not in a position to claim that right by reason of the parents' death. Thus he came to the conclusion that the eldest child, whether grown up or not, could claim one-fourth of the estate on the re-marriage of the surviving parent. This view has been affirmed in a Bench of decision of the High Court in Tun Yin v. Po Lwin.(89).

In no case has the question of the right to the mother's personal belongings and the dwelling house arisen; claims to the same, except as part of the general estate, are apparently obsolete (90).

It also appears that no claim has ever been put forward on behalf of a minor eldest daughter against her father, but, on the ruling in Maung Shwe Ywet v. Tun Shein (91), it would appear that the daughter, if the eldest child, would be entitled to quarter share.

A further question arises: Is the quarter share of the eldest child on the re-marriage of the surviving parent a vested right? In other words, if the eldest child dies after the

(89) Civil list appeals 31 & 92 of 1915; see also U May Oung, Leading Cases on Buddhist Law, 229.
(90) Ibid.
(91) (1921) 11 L.B.R.199.

re-marriage of the surviving parent without having claimed his or her share, can his or her heirs claim the same? Until the decision in Maung Pan On v. Tun Tha (92), it seemed to have been assumed that even the orasa's quarter was not vested, but in that case, it was definitely laid down that it vests on the death of the relevant parent. In Maung No v. Maung Po Thein (93), however, May Oung, J., considered that the right of the auratha and the right of the eldest son to quarter share on the re-marriage of his father were distinct rights and that the latter was not vested. In support, he cited the remarks of Hartnoll, J., in the Full Bench case of Shwe Po v. Maung Bein (94). His views, however, were considered to be obiter, and in Ma E Mya v. U Pe Lay (95), Lentaigne, J., refused to follow them. The learned Judge held that on a parity of reasoning, the remarks of their Lordships of the Privy Council in Tun Tha's case (96) would apply to the share arising on the re-marriage of the surviving parent. "I think that the option in that case likewise was not a mere option to elect, but was a very similar option to the option of the orasa child to take a definite one-fourth part of the estate." The ruling in Shwe Po v. Maung Bein (97) has been superseded by that of the Privy Council in Tun Tha's case; and thus it would appear that the preponderance

(92) (1921) 11 L.B.R.192.
(93) (1923) 1 Ran.363.
(94) (1914)8 L.B.R.115.
(95) (1925) 3 Ran.281.
(96) (1916 9 L.B.R.56; 441.A.42.
(97) (1914)8 L.B.R.115; see Ma Hnin Yi v. Mg. Thein, (1940) Ran.32.

of judicial opinion is in favour of the view taken by Lentaigne J.

Where the husband dies, leaving the wife and issue, the widow is entitled immediately to three-fourths of the joint estate if there is a son capable of taking as orasa and to the whole if there is no such son; daughters and kanittha sons have no claim (98). A minor eldest son's share must be ascertained and kept apart (99), but as to the position when the widow re-marries, and the claim is by the eldest daughter, there was conflict between the Courts in Burma.

In Ma Thin v. Ma Wa Yon (100), the suit was by an adopted daughter - the only child - against the surviving widow and her second husband. It was urged on behalf of the plaintiff that an elder or only daughter, upon the death of her father, is entitled to claim a fourth share against her surviving mother, but on a reference to a Full Bench, it was not deemed necessary to consider the proposition as thus broadly stated, since the mother had remarried. The case before the Court was the exact converse of that in Maung Seik Kaung v. Maung Po Nyein (101) and section 4 of Manugye, X, was referred to: but it was observed in that a daughter's right against her mother does not, according to the published text, correspond exactly with the son's right against his father as given in section 2. Section 4 says that, on the mother's re-marriage:- "If the partition be made after

(98) Manugye, Book X, section 4, 5; Digest I, sections 30, 31, 34.
(99) Manugye, Book X, section 5; Digest I, section 44.
(100) (1904) 2 L.B.R. 255 (F.B.)
(101) (1900) 1 L.B.R.23.

the mother has taken a second husband, let all the father's clothes and ornaments be delivered into four portions, three of which the mother and younger daughters shall take, and let the fourth be given to the eldest daughter; let the mother have the house. The property, animate and inanimate, given to the eldest daughter, shall be noted before witness and (they) shall take care of it, and if the mother dies, let the eldest daughter have the property above alloted to her."

Hence the daughter's position, according to Manugye appeared to be inferior to that of the son. But it was also found that the majority of the Dhammathats cited in section 44 of the Digest, and in section 159, Attasankhepa, favoured division of the bulk of the estate between an eldest daughter and the mother on the latter's re-marriage. The Court therefore held that "there is ample authority in the Dhammathats for holding that a single daughter is entitled to claim one-fourth share of the joint estate from her mother on the death of the father when her mother re-marries."

This decision was strongly dissented from by McCall,A.J.C., in the Upper Burma case of Mi The O v. Mi Shwe Mi (102), wherein the contention was that an only daughter had a right of partition against her mother who had re-married. The learned Additional Judicial Commissioner was of opinion that the minority of the Dhammathats in section 44 of the Digest(including

(102) (1914) U.B.R. (1914-16) 46.

Manugye, "which has generally been considered to have special authority") are entitled to greater weight than those followed in Ma Thin's case and that the Attansankhepa text is merely "an attempt to reconcile numerous very conflicting texts." He therefore held that the eldest daughter cannot claim one quarter of the estate from her mother even though the latter marries again.

In Maung Po Kin v. Maung Tun Yin (103), it was pointed out after recapitulating the authorities cited above that the Dhammathats agree that the eldest son, if not competent to claim earlier as an orasa, gets a right to claim partition on the re-marriage of the surviving parent; they give the eldest daughter, not competent to claim an orasa share, a right to claim partition if the surviving father re-marries. Sex equalisation is a dominant feature of the written law of the Burmese people (104); the national customs and usages favour equal rights for sons and daughters (105); no sufficient reason exists for denying the daughter a right as against her mother. It was accordingly held that the eldest child, on the re-marriage of the surviving parent, becomes entitled to a quarter share in the joint estate of the parents, if he or she has not already taken a share as orasa. On such re-marriage, the younger children become entitled collectively to a quarter share of the joint estate of the parents

(103) (1926) 4 Ran.207.
(104) Manugye, Book X 11, section 43.
(105) Kirkwood (a) Ma Thein v. Mg.Sin,(1924)2 Ran.693 at 711,724, 746, 772 and 763(P.C).

Hence in Maung Po Kin v. Maung Tun Yin (106) the earlier decisions in Maung Seik Kaung v. Maung Po Nyein (107), Ma Thin v. Ma Wa Yon (108), Shwe Po v. Maung Being (109), Maung Shwe Ywet v. Mg. Tun Shein (110), and Ma Tok v. Ma U Le (111) were affirmed. In Maung Kyin v. Ma Kya Gaing (112) Otter, J., said, "Thus there can be no real doubt that as the law stands today - an eldest daughter prima facie does become entitled to a quarter share in the joint property of her parents' marriage upon the re-marriage of the mother."

It was accordingly held in this case that for the eldest child to be entitled to claim a quarter share on re-marriage of the surviving parent, it is not necessary that he or she should attain the age of majority while both parents are alive.

It would therefore appear that upon the re-marriage of the surviving parent the issue of the former marriage are entitled to the following share or shares in the estate of the surviving parent:

(i) The eldest surviving child: a one-quarter share, provided he or she has not already received a share as orasa (113).

(ii) The youngest surviving children: collectively a one-quarter share (114).

---

(106) (1926) 4 Ran.207.
(107) (1900) 1 L.B.R.23. (108) (1904)2 L.B.R.255 (F.B.)
(109) (1914) 8 L.B.R.115. (110) (1921) 11 L.B.R.119.
(111) (1923) 1 Ran. 487. (112) (1930) 8 Ran.396.
(113) Mg.Po Kin v. Mg.Tun Yin, (1926)4 Ran.207.
(114) Ibid.

(iii) An only surviving child: a one-half share (115).

It may be pointed out that the application of the above rules is not free from difficulty, particularly as regards the shares to which the surviving children are entitled. The rules as they now stand make no provision for the possibility of (1) there being both an orasa and an eldest child at the date of re-marriage, (2) the orasa dying in the period which elapses between the death of the parent and the re-marriage of the surviving parent, and (3) the orasa dying before the second marriage leaving children.

As regards the estate subject to division, it was held by an appellate Bench of the High Court, in the case of Ma Shwe Yi v. Ma Kin Nyun (116), that upon the re-marriage of the surviving parent the estate in which the children are entitled to share is the actual estate of the surviving parent at the time of his re-marriage. Rutledge C.J., and Carr, J., said, "The opposite view (i.e. that the estate to be divided is the joint estate as at the date of the first parent's death) clearly brings the rules laid down in Ma Sein Ton's case (117) and Maung Po Kin's case (118) into conflict, for it is very possible that in the interval between the death of the first spouse and the re-marriage, the surviving spouse may, in the exercise of his absolute right of disposal, have alienated some of the property

(115) Mg.Sein Ba v. Mg.Kywe, (1933)12 Ran.55.
(116) (1929) 7 Ran.240.
(117) (1915) 8 L.B.R.501 (F.B.).
(118) (1926) 4 Ran.207.

forming the joint estate of the first marriage. But such alienations must, we think, be held to be entirely valid and not contestable by the children of the first marriage. If therefore those children are bound by such alienations it is only equitable that they should be entitled to share in any acquisition made by the surviving parent after the death of the first spouse and before his re-marriage." (119).

It should be pointed out that some uncertainty has been caused by two later cases in which reference is made to the joint property of the former marriage as being that in which the children of that marriage have an interest. In Maung Aung Pe v. U Tun Aung Gyaw (120), Maung Ba, J., in a judgement, in which Baguley, J., concurred stated that: "It is settled law that on the re-marriage of a surviving parent the children of the former marriage acquire a vested interest in the joint property of that marriage to the extent of the deceased parents' share", and this passage was cited with approval in Maung Sein Ba v. Maung Kywe (121). It is respectfully submitted that the proposition of law laid down in these judgements is not supported by authority; and it is further to be observed that in Maung Aung Pe's case (122) the question involved was whether, where a man has two wives at the same time, the children of the one wife are entitled, on her death to claim partition against the

(119) Ma Shwe Ya v. Ma Kin Nyun, (1929)7 Ran.240 at 242.
(120) (1930) 8 Ran.524.
(121) (1933) 12 Ran.55.
(122) (1930) 8 Ran.524.

husband and the other wife. The case is therefore distinguishable on the facts from Ma Shwe Yu's case (123). In Maung Sein Ba's case (124), the Court appears to have assumed that the joint property of the marriage would be the same as that of the surviving parent at the time of re-marriage, and that the deceased parents' interest in the joint property of the marriage was necessarily one-half. Mya Bu and Mackney, J.J., in U Tauk Ta v. Ma Ohn Yin (125) pointed out that they had been unable to discover in what decisions prior to Maung Aung Pe's case(126) such a proposition had been laid down. They approved Ma Shwe Yu's case (127) and held that upon the re-marriage of the surviving parent the estate in which the children are entitled to share is the actual estate of the surviving parent at the time of his re-marriage. They said (128),

"Such a rule is in conformity with equity, for it would be unreasonable to require a parent to make good to his children by a former marriage a part of the estate which, through no fault of his, might have disappeared subsequent to the death of the first wife and prior to his re-marriage. It is reasonable that the estate to be divided should be the estate existing at the time the reason for partition arises." The above decision was followed in U Lwin v. Mg.Tin Aung,(129) and therefore it may be said that any doubt that may have existed earlier on this point has been removed.

(123) (1929) 7 Ran.240. (124) (1933) 12 Ran.55 at 56,59 & 63
(125) (1939) Rgn. L.R.217. (126) (1930) 8 Ran.524.
(127) (1929) 7 Ran.240.
(128) U Tauk Ta v. Ma Ohn Yin,(1939) Rgn.L.R.217 at 218.
(129) (1955) B.L.R.227.

9. Partition on the death of the surviving parent, leaving the step-parent surviving.

The children of the first marriage have a right to claim partition upon the death of the surviving parent, whether such death occurs before or after the death of the step-parent (130). So long, however, as the step-parent remains alive the children of the second marriage cannot be the heirs of the surviving parent, and they are not, therefore, upon his or her death entitled to claim partition (131).

The division between the children of the common parents' former marriage and the step-parent is governed by the following rules (132).

(1) Payin brought to the second marriage by the common parent (133) is divided so that the step-parent takes a one-fourth share, and the children of the common parents' former marriage take a three-fourths share (134).

This rule is in most of the Dhammathats including Manugye and Attansankhepa (135).

Where, however, there is issue of the second marriage there has been conflict of judicial opinion. In Mi Chan Mya

(130) Mg.P[illegible] Thit v. Ma E Yin,(1924)2 Ran.521; Ma Nyein E v. Mg.Maung, (1925)3 Ran.549 (F.B.)
(131) Ma E Myin v. Mg.Ba Maung,(1924)2 Ran.123.
(132) Where the division is between 'out-of-time' grandchildren and the step-grandchildren, see under 'out-of-time grandchildren'.
(133) Payin brought to the second marriage by the step-parent appears not to be subject to partition on the death of the surviving parent; see O.H.Mootham,Burmese Buddhist Law 112.
(134) Mg.Chit Saya v. Ma Meinkale,(1892) II U.B.R.(1892-6)93; Ma Ba We v. Mi Sa U,(1903) 2 L.B.B.R.174 (F.B.), overruled on another point by Ma Nyein v. Mg.Maung,(1925) 3 Ran 549(F.B.); Ma Nwe v. Ma Sein Da,(1929) 7 Ran.578. 549(F.
(135) Manugye,X,2-5; Attansankhepa, 20.

v. Mi Ngwe Yon (136) where the child of the first marriage sued her step-mother for partition on the father's death, that being issue of the second marriage, it was contended for the widow and her child that the division should be five-eighths for the atet child, one-fourth for the step-mother and one-eighth for the issue of the second marriage. In support Attahsankhepa section 220 and certain texts in section 229 of volume I of the Digest, were relied upon. McColl, J.C., however, held that the presence of issue of the second marriage will not take the case out of the purview of the basic rule three-fourths to the atet children and one-fourth to the step-parent; the issue of the second marriage could not claim a share till their mother's death. The learned judicial commissioner would not accept the view that the majority of the Dhammathats which prescribe the three-fourths rule were not then contemplating the case where there were children of the second marriage, "seeing that they proceed immediately to refer to such children when considering the partition of the lettetpwa of the second marriage" and in the second place the text from the Manuyin after giving the rule of three-fourths of the atet property to the children of the first marriage and one-fourth to the widow continues, 'such property shall not be given to the offspring of the second union' and the text from the Dayajja says, "the mother having died the father marries again, and dies leaving issue by the second marriage. The children of the former marriage shall get three

(136) (1915) II U.B.R. 74.

out of four shares of their own parents' property, and the remaining share shall be given to their step-mother!" It is further to be noted that the Dhammathats that give the five-eighths, two-eighths, and one-eighth rule are much older than the Manuyin and the Dâyajja." As further, he was of the opinion that Attasankhepa was an attempt at reconcilement of contradictory texts of the older Dhammathats without any indication of the basis on which reconciliation is justified, and the tendency of the work is to elaborate intricate rules of division of property, the learned Judge held that the three-fourths and one-fourth rule should be followed, even where there is issue of the second marriage.

The decision in the Lower Burma case of Mi Chit Lu Ma v. Mi Win Ma U,(137), was to the same effect, though the texts were not discussed.

However, in Ma Lay v. Tun Shwe (138), in Lower Burma, and in Ma Ein Hlaing v. Ma Shwe Kin (139), in Upper Burma, the contrary view was taken. In Ma Lay's case, Twomey, C.J., said,

"It was pointed out in Ma Ba We v. Mi Sa U (140) that although the Attasankhepa is not an original Dhammathat, it is a work of very considerable weight because the ex-Kinwun Mingyi was a well known authority on Burmese Buddhist Law. According to this authority, the rule under which the step-mother takes one-fourth and the children of the former marriage

(137) (1917), 10 B.L.T.41.
(138) (1918) 10 L.B.R.10.
(139) (1920) 3 U.B.R.272.
(140) (1903) 2 L.B.R.174 (F.B.)

three-fourths is applicable only when there is no issue by the 'second marriage'. Section 220 of the Attansankhepa goes on to say; 'if, however, children are born after the second marriage, let the property brought by the father or mother be divided into eight shares and let the children of former marriage take five shares, step-father or step-mother, two shares and the children of the second marriage one share. "Thus the Kinwun Mingyi adopted the rule given in the Kungya and the Vinicchaya Dhammathat and treated the Dhammathats which allow a share to the step-mother alone as being applicable only to a childless step-mother."

In the Upper Burma case (141) Swinhoe, A.J.C., considered that as the right of the children of the first marriage to partition is admitted, 'the children of the second marriage have just as strong a claim to a similar share in the property acquired during the first marriage and no reason is shown in the Dhammathats why the children should not mutually have a one-eighth share in the property of the other marriage.' But the reason seems to be obvious; the atet children's relationship to their father or mother is not severed by his marriage; whereas, the auk issue as also the parent through whom they claim begin to have a relationship with the father or the mother only from the second marriage.

These rulings were considered in Ma E Hmyin v. Maung Ba Maung (142), where a Bench of the High Court held that the issue

(141) Ma Ein Hlaing v. Ma Shwe Kin, (1920) 3 U.B.R. 272.
(142) (1924) 2 Ran.123

by the second marriage are not co-heirs with their surviving parent, thus dissenting from a branch of the ruling in Ma Ein Hlaing's and Ma Lay's cases. As it was not necessary to determine the shares of the atet children when there was issue of the second marriage, no finding on that point was come to. But the learned Judge's summary of the effect of the Dhammathats cited in section 229 of the Digest is interesting and throws light on the problem; "as regards property brought by the father to the second marriage Vilasa, Dhammathatkyaw, Vaṇṇanâ, Manuyin, Râsi, Manuvaṇṇanâ, Pakâsanî, Vicchedanî, Râjabala, Pânam, Dâyajja, Dhammasâra, and Kyetyo all give the children of the first marriage three-fourths and the second wife one-fourth. Rasi, Manuvaṇṇanâ, Pakâsani, and Dâyajja make the shares four-fifths and one-fifth, if the property was the 'separate property of the father'. Kungya and Vinicchaya not only mention the children of the second marriage but also apply to the property which the father brought to the second marriage the rule which nearly all the other Dhammathats apply to the jointly acquired property of the second marriage. Yazathat similarly applies to the property brought by the father to the second marriage the rule which Manu applies to the jointly acquired property of the second marriage. It seems probable that the authors of both these Dhammathats found the rule in an older Dhammathat and misapplied it. The alternative rule in Dâyajja, which is found in no other Dhammathat seems to be merely an attempt on the part of the author to adopt the four-fifths and one-fifth

rule mentioned above so as to provide specifically for the children of the second marriage."

Further, Attasankhepa, 220 has, "ကျန်း အရိုးများရှိ၍ ဖြစ်ဟု" some Dhammathats would divide (the estate) into eight shares, "and thus it would appear that the learned Author was not so much expressing his opinion as merely stating that there was this conflict of opinion.

Accordingly, it is submitted that the rule of division would not be altered by the presence of issue of the second marriage (143).

If there are children by more than one earlier marriage of the common parent such children will together be entitled to the three-fourths share, the children of the marriage to which the payin was brought obtaining, collectively, double the share of the other marriage or marriages (144). Thus where the heirs are a third wife and the children of the first and second marriages and the property to be divided is payin brought by the deceased husband to the first marriage the shares are:-

Third wife..... a one-fourth share
Children of
second marriage..... a one-fourth share.
Children of
first marriage..... a one-half share (145).

Where, however, it is not possible to ascertain to which of the earlier marriages the payin was brought, it is probable that the

(143) see also U May Oung, Leading cases on Buddhist Law, 282.
(144) Ma Ba We v. Mi Sa U, (1903)2 L.B.R.174 (F.B.)
(145) Mg.Chit Saya v. Ma Meinkale, (1892)II U.B.R.(1889-96)93.

three-quarter share to which the children are entitled will be divisible between them equally per capita (146).

Regarding partition of hnapazon.

Manugye says, "I will now lay down the law as regards the partition of property between the step-father and his step-son. If the step-son be living with his step-father at the time of his mother's death, let her property be divided into four shares and the husband have one. If during the time of her coverture with the second husband she shall have inherited the property of her parents, let the husband have half of it though she has no children by him, as the husband has a right to the wife's property; and let the step-son have the other half; and though the mother inherited her father's property during her coverture with the step-father, he has no right to the grandson's share; let his step-son have it. Let them bear the debts in the same proportions; and of the property acquired during the coverture of his mother, let the step-son have one-sixth share" (147).

"If a man and woman, having each children shall marry and have a common family, the two laws for the partition of the property between the man and the children, on the death of the woman are these; let the original property of the deceased mother be divided into four shares; let the step-father have

(146)Ma Ba We v. Mi Sa U, (1903)2 L.B.R.174 (F.B.)
(147)Manugye, Book 10, section 8.

one and the son of the deceased three shares. If there have been any property acquired during the second marriage, let it be divided into eight shares; let the father have five, the son of the last marriage two, and the sons by the former marriages one share. If the father dies first and the mother afterwards, though the father may have had no property, let the mother's property be divided into five shares, of which let her son have three; let the remaining two shares be divided into three; of these let the son of the father have one, and the son of the last marriage the other two. Should the mother die first and the father afterwards, let the same relative propositions be observed." (148)

It may be said that where a widower with children marries a maiden and has issue of the second marriage, section 10 of Book 10 of Manugye is not applicable for the case there contemplated is that a widow with children marries a widower with children and has issue of the new union. But that makes no difference, for Manugye says, "If there have been any property acquired during the second marriage, let it be divided into eight shares; let the father have five, son of the last marriage two, and the sons by the former marriages one share." From this it is clear that the one-eighths share is given collectively to the atet children. So if there be atet from one side only that one-eighth share shall go to those atet children only.

(148) Manugye, Book 10, section 10.

Hence according to Manugye, the step-children get one-sixth and the step-parent five-sixths of the hnapazon property when there is no issue of the subsequent marriage, but the step-children get one-eighth and the step-parent seven-eighths of the hnapazon property when there is issue of the subsequent marriage.

But it was decided in Nga Po Thit v. Mi Thaing (149) that on the death of the father, who has married two wives in succession, the children of the first marriage are entitled to one-eighth of the property acquired during the continuance of the second marriage. In this case it is not clear from the judgement whether there was a child of the second marriage. If there was then the judgement is in accordance with the rules mentioned in Manugye. But if there was no issue of the second marriage the judgement is in conflict with the rules laid down in Manugye. The text in Book 10, section 10, was referred to in the judgement but not section 8.

In Mi So v. Mi Hmat Tha (150), it was decided that when a father on the death of his wife marries again and dies leaving no issue by the second wife, the children of the first marriage take one-eighth of the joint property of the second marriage and the widow seven-eighths. In this case Manugye Book 10, section 8, which covers such a case was casually referred to but not discussed. With much hesitation Sir John Jardine decided the case as indicated above relying on Nga Po Thit's

(149) (1873) S.J.18.
(150) (1883) S.J.177.

case (151) and Wunnana, (152), and Mahāmicchādanī Dhammathats (153).

In Ma Ba We v. Mi Sa U (154), a man married thrice in succession; there was issue of the first and second marriages, the man died leaving him surviving his atet children and his childless third wife; he left atetpa property as well as hnapazon property of the last marriage. It was held by a Full Bench of the Chief Court of Lower Burma that, in a partition between the atet children and the widow, the widow was entitled to one-fourth of the atetpa and seven-eighths of the hnapazon; the atet children were entitled to share equally per capita in three-fourths of the atetpa and one-eighth of the hnapazon (155).

Up to this point the provisions of section 8 of Book 10 of Manugye were being over-riden by the rulings of the Courts. But in Ma Nyein E v. Maung Maung (156) a Full Bench of the Rangoon High Court reviewed the question whether the decision in Ma Ba We's case (157), which followed Sir John Jardine's decision in Mi So's case (158), was correct and held that, as Manugye is clear, unambiguous and well-founded, it ought to be

(151) (1873) S.J.18.
(152) Digest I, section 23.
(153) Digest I, section 35.
(154) (1903) 2 L.B.R.174 (F.B.)
(155) Ibid.
(156) (1925) 3 Ran.549 (F.B.)
(157) Ma Ba We v. Mi Sa U, (1903) 2 L.B.R.174(F.B.)
(158) Mi So v. Mi Hmat Tha, (1883) S.J.177.

followed; where a Burman Buddhist, who has married more than once, dies leaving hnapazon property of the last marriage, the law of partition of that property between the step-children and their step-parent is that the step-children get one-eighth and the step-parent seven-eighths, if there is issue of the last marriage; but the step-children get one-sixth and the step-parent five-sixths when there is no issue of the last marriage (159).

So, the present position is that:-

(1) hnapazon of the second marriage is divided as follows.

(a) Where there is issue of the second marriage, the step-parent takes a seven-eighths and the children of the first marriage take one-eighth (160).

(b) Where there is no issue of the second marriage, the step-parent takes five-sixths and the children of the first marriage take one-sixth (161).

(ii) Lettetpwa of the second marriage acquired by the common parent is divisible between the step-parent and the children of the first marriage in equal shares (162).

Regarding the lettetpwa of the step-parent of second marriage, it was held in U Hla Pe v. Ma Hla Khin (163) that the children of the first marriage of their mother are entitled, on the death of their mother without issue of her second marriage

(159) Ma Myein E v. Mg.Mg, (1925)3 Ran.549(F.B.).
(160) Ma Nyein E v. Mg.Maung, (1925)3 Ran.549(F.B.).
(161) Ibid.
(162) Mg.Tun Gyaw v. Ma Balo, (1900)II U.B.R.(1897-1901)185; Mg.Paw Thit v. Ma E Yin, (1924)2 Ran.521.

(163) (1941)Rgn.L.R.440.

to a one-sixth share in the joint property, whether hnapazon or inherited lettetpwa of their mother and their step-father. It was pointed out that there is a special provision in section 8 of Book X of Manugye for the inherited lettetpwa of the deceased parent, but there is no special provision for the inherited lettetpwa of the surviving parent, and, consequently, as a matter of construction, the inherited lettetpwa of the surviving parent is included in the general term 'property acquired during the coverture of his mother'. That such inherited property is joint property of the couple has been laid down in the case of C.T.P.V.Chetty Firm v. Maung Tha Hlaing (164). The words used in this phrase, both in the original Burmese and in the English translations, are sufficiently wide to include not only the hnapazon property acquired by the joint exertion of the couple, but also property acquired during coverture by either of them by inheritance from their parents or relations; and the phrase is certainly not restricted to hnapazon property only. The judgement of the Full Bench in Ma Nyein E's case (165) was restricted in terms to hnapazon property because that was the only kind of property in the case before the Court, but the judgement is based on an interpretation of sections 8 and 10 of Book X of Manugye, and the reasoning contained in the judgement of Maung Ba J., is equally applicable to any other kind of joint acquired property.

(164) (1925) 3 Ran.322 (F.B.).
(165) (1925) 3 Ran.549 (F.B.).

10. Partition on the death of the common parent after that of the step-parent, or vice versa.

It would seem that the right to claim partition upon the death of the step-parent arises only when the death of the step-parent occurs after that of the common parent, for so long as the common parent remains alive the children (other than the orasa) of the second marriage will not be entitled to any share, nor is there upon the prior death of the step-parent the fear of misappropriation or waste which is the foundation of the rules allowing partition upon marriage (166).

The Dhammathats, it has been pointed out (167), are in favour of the family property being kept undivided until the death of the last parent; the rule of division is not therefore in any way dependent on whether the common parent or the step-parent predeceases the other. A difference is, however, made between the case when only one spouse had children by an earlier marriage, and the case when both had.

In the final case i.e. when only one spouse had children by an earlier marriage, payin brought to the second marriage by the common parent, provided none is brought by the step-parent and no property is acquired during the second marriage, is divided as follows:-

The children of first marriage take three-quarters and

(166 see in Mg.Lu Gale v. Mg.Lu Po, 4 U.B.R.140;
(167 Mg.Po Aung v. Mg.Kha, (1928) 6 Ran.427(F.B.)per Mg.Ba J. at 437.

Mg.Po Aung v. Mg.Kha, (1928) 6 Ran.427(F.B.)per Mg.Ba J. at 437.

children of second marriage take one-quarter (168), but such payin will go to the children of the first marriage, if the step-parent also brings payin to the marriage, or if property is acquired during the second marriage (169).

The rules with regard to the partition of payin brought to the second marriage are founded on provisions of Manugye (170), which lay down that, where payin is brought to the second marriage by the step-parent, it shall if there be no other property of the second marriage, go wholly to the children of that marriage and the step-children in the proportions of three to one.

Lettetpwa of the second marriage acquired by the common parent is divisible between the children of both marriages(171).

The texts (172) do not lay down any general principle applicable to this kind of property, and the rule of equal division was formulated in the case of Maung Gale v. Maung Bya (173) on the ground that there was no reason for preferring the children of the second marriage at the expense of those of the first. The lettetpwa then under consideration had, however, been acquired by the common parent; but where lettetpwa is acquired by the step-parent who, unlike the common parent, ordinarily is unrelated by blood to the children of the

(168) Ma Hpan v. Ma Ngwe Sa, (1929)7 Ran.526.
(169) Mg.Lu Gale v. Mg.Lu Po, (1922)4 U.B.R.140.
(170) Digest I, section 237.
(171) Mg.Gale v. Mg.Bya, (1906)4 L.B.R.189.
(172) Digest I, section 237.
(173) (1906) 4 L.B.R.189.

first marriage, different considerations might well be held to apply.

The principles to be followed in the case of hnapazon property is that the children of the marriage during which the property was acquired are entitled to double the share of the children of any other marriage (174), and in the application of this principle grandchildren take the share to which their parents would have been entitled (175).

Thus, where a man who had married three wives in succession died leaving him surviving grandchildren of the third marriage and children of the first and second marriages, it was held that in the hnapazon of the third marriage the share of the grandchildren was one-half, and the share of the children of each of the other marriages was one-quarter (176).

Where two persons, each with children of a previous union, marry, the texts, except Kaingza, provide that the whole of the property of the second marriage shall, in the absence of children of that marriage, be divided equally between the children of the former marriages. Kaingza says each group takes the payin of its parent (177). So far only the question

(174) Mg.Po Aung v. Mg.Kha, (1926) 6 Ran.427(F.B.). The property in suit in this case is described in the headnote as lettetpwa, but it would appear that it was in fact hnapazon see Maung Ba, J., at p.435, where he speaks of 'properties jointly acquired'.
(175) Ma Min E. v. Ma Kyaw Thin, (1897) P.J.361. Ma Nan Shwe v. Ma Sein, (1924)2 Ran.514 and see under 'out-of-time' grandchildren.
(176) Ma Min E v. Ma Kyaw Than, (1897) P.J.361.
(177) Digest I, section 253.

of division of hnapazon property has come before the Courts for consideration and the Court ruled that A, a widower with children married B, a widow with children - that there was no issue of the union of A and B, and A predeceased B, on the death of B the children of A and the children of B were entitled to half the hnapazon of the marriage of A and B (178).

---

(178) Mg.Po San v. Mg. Po Thet, (1925) 3 Ran.438.

CHAPTER XVI

LOSS OF RIGHTS OF INHERITANCE.

1. The effect of adoption on rights of inheritance.

The rights of inheritance are, in general, so intimately connected with the maintenance of the family that, if the latter be broken, the former are necessarily affected. The family bond is clearly severed when a child is taken in adoption by another person, and it is also broken by divorce of a child's parents. In these two cases the severance of the family tie is a matter over which the heir has no direct control. A third case arises when the heir intentionally severs the tie himself or acts in so undutiful a manner that he can no longer be considered a member of the family. A fourth case arises when a person becomes a phongyi (monk) without retaining the animus revertendi. In these two latter cases the heir intentionally severs the tie himself.

A person taken in adoption loses thereby any right to a share in the estate of his natural parents (1). Burgess, J.C., observed,

"The adopted child drops out of his own family and is provided for in that adopting him. The expectations and arrangements of the members of the family he has left are formed accordingly, and it would be manifestly inequitable to let the child adopted in another family come back into his own

(1) Mg.Pan v. Ma Hnyi, (1897)II U.B.R.(1897.01)104.

and disappoint the reasonable calculations of the future which have been made therein." (2).

Under Burmese Buddhist Law the relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act of the parent. An adoptive parent has no power to disinherit his adoptive child (except possibly by giving him in adoption) any more than a natural parent has such power in respect of his natural and lawful children (3). If the adoptive parents show by their acts that they have severed the relationship with the kittima child, and if the conduct of the child who has reached the age of discretion shows that he has acquiesced in their wishes, as expressed by their acts, so that neither party regard the other any more as child or as parents, then the presumption arises that the tie between the adoptive parents and the child has been broken and the latter's right of inheritance in his adoptive parents' estate is lost(4). Where the evidence is sufficient and clear that a person was the kittima adopted son of his adoptive parents, the mere fact that his natural father subsequently made a gift of some property to him and in the deed of gift described himself and his donee as father and son respectively, does not prove by

(2) Mg.Pan v. Ma Hnyi,(1897) II U.B.R.(1897.01) 104.
(3) Ma Kyin Sein v. Mg.Kyin Htaik,(1940) Rgn.L.R.783.
(4) Ibid.

itself that the adopted son had not severed his natural family tie (5). He still remains the adopted son of his adoptive parents, a gift of immoveable properties does not by itself signify much. The natural father, from love and affection for the child he had begotten might want to benefit him, or he might have aided from motives such as these described by Mg.Kin J., when he said (6),

"Regarding the contention that the fact of the plaintiff's having obtained inheritance in her natural parents' estate negatives the idea of there being an adoption, it is not, in my opinion, tenable at all. There must be many cases in which a child adopted into another family is allowed to inherit from its natural parents, owing to ignorance of the law on the part of the co-sharer. In any case, this fact alone cannot overthrow the conclusion to be arrived at from positive evidence."

2. The effect of a divorce between parents on a child's right to inherit to them.

The family tie is severed by divorce, and the rights of the children of a divorced couple seem to depend upon the arrangements made at the time of the divorce as to which parent they shall belong (7). Upon the divorce of their parents the

(5) M.R.Meyappa Chettyar v. Ma Nyun, (1941) Rgn.L.R.742.
(6) Maung Seik v. Ma Thet Pu, Special Civil Side Appeal No.135 of 1915 Chief Court of Lower Burma, quoted in M.R.Meyappa Chettyar v. Ma Nyun, (1941) Rgn. L.R.792.
(7) Maung Ba Thwin v. Maung Po Hti, (1928) 6 Ran.510 at 518.

children of the marriage will lose their rights of inheritance in the property of the parent with whom they cease to live, unless filial relations with that parent are maintained (8).

The leading authority on the subject is Mi Thaik v. Mi Tu (9) decided by Sir John Jardine in 1883. He based his judgement upon the principle of Burmese customary law that a child who upon the divorce of his or her parents, is taken by one of them and clings to that parent and to the latter's new spouse, has become a member of a new family and has lost his or her rights in the old.

In Mi Thaik's case (10), a daughter who attained majority during her father's lifetime claimed her share in the lettetpwa property of her father and his second wife. The principle laid down in that case is of general application and has consistently been followed. Hartnoll, J., observed,

"As has been pointed out in the various cases parents have a right of control over their children, and in the case of a divorce a position very analogous to that of adoption arises. In adoption parents give away their children to others and unless filial relations are resumed the children so given away lost all rights of inheritance from their natural parents. In the case

(8) Ma Chit May v. Ma Saw Shin, (1934) 13 Ran.166.
(9) (1883) S.J.184.
(10) Ibid.

of young children their wishes are not consulted. It is the will of the natural parents and those who adopt them which decides the matter. Similarly in the case of divorce where the children are of tender age it is the will of the parents which decides the disposition of the children and I think that it must be held similarly that the children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed." (11).

It is immaterial when the property of the parent was acquired (12); and the severance of the tie binding the child to the parent with whom he or she ceases to live, also involves the severance of the tie connecting that child with the heirs of such parent by a former marriage (13).

Filial relations have been defined as living, planning and working with the father (14); at least the child must aid and cherish the separated parent and live with him or under such circumstances as to show that the filial duty is discharged according to such parent's wishes and that the family tie is kept unbroken (15). It is a question of fact in every case whether filial relations have been maintained and it is doubtful

(11) Ma Yi v. Ma Gale, (1912) 6 L.B.R. 167 at 169.
(12) Ma Shwe Ge v. Nga Lan, (1884) S.J.296.
Ma Pan v. Mg.Po Chin, (1899)II U.B.R.(1897-1901)116;
Ma Tin U v. Ma Ma Than, (1927) 5 Ran.359.
(13) Le Maung v. Ma Kywe, (1919) 10 L.B.R.107.
(14) Ma Shwe Ge v. Nga Lan, (1884) S.J.296.
(15) Ma Sein Nyo v. Ma Kywe, (1893) II U.B.R.(1892-96)159.

if any precise definition can usefully be made. Separate living is not by itself sufficient to negative the due performance of filial duties (16), and, on the other hand, the education and maintenance of the children is not necessarily sufficient to revive the right to inheritance possessed by the former prior to the divorce (17).

The law with regard to the resumption of filial relations has been concisely summarized in Ma Chit May v. Ma Saw Shin (18) by Leach, J., who said:

"The lost right may be regained by what is usually described as the resumption of filial relations. It is, however, necessary to bear in mind what is to be implied by the use of these words. The right can only be regained if the parent from whom the child was separated wills it. A daughter who has lived with her mother since the divorce of her parents is not to be regarded as an heir of her father merely because she and her father have remained on terms of affection and she has continued to visit him. If at the time of the divorce the daughter lost the right to inherit her father's estate the right can only be regained by the father taking her back into the family and accepting her as one of his heirs. In other

(16) Ma Tin U v. Ma Ma Than, (1927) 5 Ran.359; Ma Ngwe Kin v. Ma Hme, (1923) 1 Ran.42.
(17) Ma Chit May v. Ma Saw Shin, (1934) 13 Ran.~~359;~~ 166; see further instances discussed in the chapter on the Effect of Divorce on Children (supra).
(18) (1934) 13 Ran.166.

words the governing factor is not the will of the daughter, but the will of the father" (19).

It was held in Mi Nyo v. Mi Nyein Tha (20) upon the basis of the texts cited in S.297 of the first volume of the Digest, that when a husband divorces his wife after she has conceived the child is, upon the father's death, entitled to a half share in his estate, the other going to the father's sister.

A child who after the divorce of its parents who are Burmese Buddhists, neither lives with nor maintains filial relationship with one of its parents does not lose its right of inheritance to the property of that parent's parent and it is not necessary that filial relationship between itself and its parent should be resumed before it can inherit from the grandparent. Buddhist law like all other systems of law attaches great importance to blood relationship and the grandchild in such a case claims to inherit in his own right as a blood relation - as a son begotten after regular marriage by consent of parents ဖခင် မိခင် ပေးစားသော သားဖြစ်. and not as a representative of the father or his family (21)

3. The effect of a child's misconduct on his rights to inherit to his parents.

An heir's right of inheritance in his parents' estate will be lost on proof of conduct on his part showing a deliberate intention to sever the family tie (22).

(19) (1934) 13 Ran. 170 at 174.
(20) (1906) II U.B.R.(1904-6) Buddhist Law, Inheritance 15.
(21) Ma Thein Nu v. Ma Pwa Thit, (1948) B.L.R.126.
(22) O.H.Mootham, Burmese Buddhist Law, 120.

The family bond can be broken by conduct of the heir himself, that is to say by 'his desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred (23). Whether the heir's conduct in any particular case is sufficient to establish the severance of the family tie is, of course, a question of fact. It is, however, to be observed that heirship is a status, and that, once that status has been established, it is not necessary for the heir also to prove that he has not broken off filial relations (24). Their Lordships of the Privy Council said,

"Conduct can indeed operate as a disqualification of the right, but it is in no sense a necessary qualification to obtain the right." (25).

It was held in Ma Taik v. Ma Nyun (26) that the Buddhist Code does not give any meritorius value to mere living together or make the opposite state of things a reason for exclusion. There must be some filial neglect to exclude, and the burden of proving such neglect is on the person asserting it. It was held in Maung Sein Thwe v. Ma Shwe Yi (27) that mere separate

(23) Shwe Gon v. Hnin Bwin, (1910) 5 L.B.R.231, reversed on other grounds by the Privy Council (1914), 8 L.B.R.1.
(24) Mg.Sein Thwe v. Ma Shwe Yi, (1920) 10 L.B.R.396.
(25) Mg.Dwe v. Khoo Haung Shein, (1924) 3 Ran.29 at 34 (P.C.)
(26) (1901) II U.B.R. (1897-1901) 193.
(27) (1920) 10 L.B.R.396.

residence does not by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights. Joint living is an outward and visible sign of the maintenance of the family bond which may safely be dispensed with in the case of natural children because, as it is said, the tie of blood is notorious. In the case, however, of an adopted child, according to the Dhammathats he forfeited his right of inheritance by living separately from his adoptive parents (28) and it has been held that a kittima son, living apart from his adoptive parents, loses his right to inherit their estate unless he shows affirmatively that the tie of relationship has been maintained (29). But the strictness of this rule has been modified, for it was pointed out in earlier cases on the same point that allowance must be made for the changing conditions of society (30) and that the real issue for determination in such cases is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie (31). Their Lordships of the Privy Council in the case of Mg.Thwe v. Mg. Tun Pe observed (32),

"A kittima child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive

(28) Manugye, Bk.X, Sec.25 & 26.
(29) Mg.Shwe Thwe v. Ma Saing, (1899) II U.B.R.(1897-01) 135.
(30) Mg.Aing v. Ma Kin, (1893) II U.B.R.(1892-6) 22.
(31) Ma Gyan v. Ma Kywin, (1895) II U.B.R.(1892-6) 176.
(32) (1917) 44.I.A. 251 at 255.

parents - These authorities however, draw as distinction between the cases when there are other children with whom the keittima seeks to compete and share and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation. This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the keittima child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate. The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge his duties to his adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken".

In Ma Kyin Sein v. Mg.Kyin Htaik (33) it was held that the old requirement of living with the adoptive parent is no

(33) (1940) Rgn. ~~L.R.~~ 783.

longer essential to a kittima child's right of inheritance, but where there is by the parent a clear repudiation of the relationship and a deliberate choice of residence elsewhere by the child, coupled with other facts such as the upbringing and education of the child in his younger days by other people, the child refraining from claiming his share in the joint property on the death of his mother and re-marriage of his father, although the claim of the natural daughter was acknowledged and satisfied, and the casual attendance at the adoptive father's funeral without takihg part in the ceremonies, the inference arises that the tie of parent and child has been severed.

The undutiful son is known as 'the son like a dog', or, shortly, 'dog son'; swanutta. Most of the texts exclude a disobedient child from the inheritance, Manugye laying down that 'children who defy the authority of the parents and act contrary to their wishes or who use abusive language to their parents and lift their hands against them shall not inherit (34)." In most of the Dhammathats cited in section 17, volume 1, of the Digest, the swanutta (dog son) is described as a son who is disobedient to his parents, Dhamma, Manugye and Amwebôn stating further that he behaves like an enemy to the parents.

(34) Digest 1. Sec.21.

The Courts have refrained from attempting to lay down any general principles governing the question whether a child is a swanutta; the decision depends upon the facts and circumstances disclosed in the evidence in each case (35).

In Maung Seik Kyaung v. Maung Po Nyein (36), it was ruled that 'the hasty abuse by a son of a father on a single occasion (conduct which was also forgiven and not made a ground for any public declaration by the father) is not such conduct as to deprive the son of any right to inheritance which he has." Where a son quarrelled with his mother about money matters and left her house but was to some extent reconciled to her before her death, the mere fact of the institution of a suit by him to obtain from the mother a share of his father's estate was held not to be unfilial conduct; and the texts were interpreted to mean 'that something more than opposition or disobedience, and something quite other than general misconduct, are regarded as grounds of exclusion (37).' Where a mother executed a deed reciting her adopted son's unfilial conduct and expressly disinheriting him and the deed was never cancelled, but nevertheless there was an absolute, complete and full reconciliation subsequent to the disagreement, the finding was that the son did not conduct himself as an enemy so as to render himself

(35) U Po U v. Mg.E Maung, (1932) 11 Ran.39.
(36) (1900) 1 L.B.R.23.
(37) Ma Mya Me v. Maung Ba Dun (1904) 2 L.B.R.224.

incapable of inheriting; and it was declared that 'the strictest proof would be required that a son had conducted himself as an enemy to justify a Court in disinheriting him under this law (38). In Maung Te v. Ma Kywe (39) a daughter of full age married against the mother's wishes, but later she returned and the mother gave her and her husband lands to work; there was no irreconcilable breach between them. The daughter was allowed to inherit, the Judge remarking, "Nor do I think there is any authority for the proposition that if a woman of full age marries without her parents' consent or against their will they are entitled to disinherit her." A child cannot be disinherited on the ground of disobedience unless (a) some gross act of defiance or enmity, or several acts of open disobedience, or disregard of parental authority, (b) an irreconcilable breach between the child and parent in consequence of such acts, and (c) clear manifestation of an intention to disinherit the child are proved (40).

MacColl, A.J.C., however, in Maung Nyi Maung v. Ma Nu (41) expressed dissent from the above statement of Law. He said,

"In saying that a single gross act of defiance may, if the second and third conditions be fulfilled, debar a child

(38) Ma Tin Shwe v. Maung Kan Gyi, (1889) II U.B.R. (1897-1901) 142.
(39) (1900) II U.B.R. (1897-1901) 169; Digest I, 95.
(40) S.C.Lahiri, Burmese Buddhist Law, 206.
(41) (1922) 4 U.B.R. 104.

from inheriting, it seems to me that the learned author has gone rather further than is warranted by the texts."

In that case, the daughter, a widow with children, had married a servant of the mother and there was as a result a total breach between the mother and the daughter which lasted till the former's death. The learned Judge held that the daughter's marriage with her mother's servant against the mother's wishes was a gross act of defiance; but that the case of a positive act of enmity should be distinguished from a single act of mere disobedience however gross. The disobedient child is to be given a chance of reforming and unless he or she is incorrigibly disobedient, the child is not disinherited. A single act of positive enmity, however, may disqualify. In support, the learned Judge referred to the two provisions of Manugye texts appearing in section 17 of the first volume of the Digest and in section 21. But the two Manugye extracts in sections 17 and 21 of the Digest do not support the distinction proposed by the learned Judge, though the texts in section 22 may be deemed to lend it some countenance. The actual decision, however, may be supported on the ground urged by the learned Judge, the right of a woman of full age to take a husband without her parents' consent.

In Ma Ngwe Bwin v. Ko Po Win (42), an old man was living

(42) (1930) A.I.R. (1930) Ran.46.

with his daughter and her son in the same house. Two years before his death a serious quarrel took place between the old man on the one side and his daughter and grandson on the other. The grandson was armed with a stick and his mother picked up a dah; they behaved in such a manner as to suggest that they were going to use these weapons against the old man. The daughter and the grandson abused the old man in most opprobrious terms totally unfit for use by a child or grandchild to its father or grandfather. This caused a son of the old man to take his father away to his own house where the old man lived until he died. Thereafter the daughter never visited her father. During the old man's last illness when the information was sent to the daughter, not only did she refuse to come and see him but used most disrespectful language about him. She did not attend her father's funeral. It was held that these facts were sufficient to cause the daughter to lose her right to inherit her father's estate (43).

Where the parent remarries it is probably immaterial whether the unfilial conduct occurs either before or after the re-marriage (44). The rule disinheriting a 'dog son' does not apply to a grandchild, as the latter has no duty of obedience towards his or her grandparents (45).

---

(43) Ma Ngwe Bwin v. Ko Po Win, (1930) A.I.R.Ran.46.
(44) Ma Mya Me v. Mg.Ba Dun, (1904) II L.B.R.224.
(45) U Sein v. Ma Bok, (1933) 11 Ran.158;
see also Lim Kar Gion v. Mrs.Iris Mg.Sein, (1955) B.L.R. 15 (S.C.)

4. The effect of ordination on Rights of Inheritance.

The Buddhist monkhood is a religious institution, and the question as to what happens to the worldly goods or property of a person who enters the order is a question regarding religious usage or institution and falls to be determined under Section 13 of the Burma Laws Act.

The Judicial Commissioner in Ma Pwe v. Maung Myat Tha (46) discovered no text in the Vinaya or other authoritive compilations which expressly declared what became of a man's property when he embraced a religious life. He said however that the sacred books indicated this by clear implication; and held that upon ordination or admission as a rahan a man became automatically divested of his property. In this case, a man left his wife and children in order to live the life of a monk, and it was held that he retained no further interest in the properties after his ordination (47).

It was at one time held that there was nothing to prevent a monk from acquiring by inheritance property which he proceeded to devote to religious purposes (48). That was a case from Mandalay. But in Shwe Ton v. Tun Lin (49), a Lower Burma case, this was was dissented from by a Full Bench of five Judges. Although the Dhammathats do not lay down that a monk is incapable

(46) (1897) II U.B.R.54.
(47) Ibid.
(48) Ma Taik v. U Wisenda, Chan Toon's leading case, 235.
(49) (1918) 9 L.B.R. 210.

of inheriting from his original family yet there is no passage in the Vinaya or its commentaries or even in the Dhammathats which expressly recognises that a monk is capable of inheriting from his lay relatives (50). The general rules deducible from the Vinaya and its commentaries are that all garuban (51) properties which had been given to the phongyi outright by way of religious gift and of which he dies possessed of go to the Sangha (Order), and that a layman cannot inherit such property from a phongyi. The general rule is recognised by the Dhammathat (52). Hence it is clear that neither can a phongyi inherit his lay relatives' properties nor can his lay relatives inherit his properties, for after ordination they become strangers to each other. Anyone who is a phongyi at the time of the death of his lay relations, is not entitled to inherit from them, even if he subsequently renounces his religious vows, because by becoming a phongyi he had as little connection with them as he would have if he were dead or adopted into another family (53). But where a person adopted by Burman parents

(50) (1918) 9 L.B.R. 241.
(51) i.e. a form of religious property. It includes monasteries and trees, the land upon which they stand and the like; see O.H. Mootham, Burmese Buddhist Law, 133.
(52) Digest I, Sections 397, 398.
(53) Maung Ni v. Maung Thet She, (1922) 76. Indian Cases 161 (162).

enters the priesthood and after some years becomes a layman again and is received back in his old home on the old status as an adopted son and heir, he is deemed to resume his position as kittima son and the years spent in the monastery do not affect his right to inherit the property of his adoptive parents (54).

In U On Kin v. Daw On Bwin (55) a Bench of the Rangoon High Court gave judicial recognition to the practise of assuming the yellow robe a short period only as being widespread among the Buddhist community. The question, therefore, whether a Burmese Buddhist becomes, upon ordination, divested of property owned by him immediately prior to his entry into the priesthood, is one of intention. Unless he enters the priesthood with the intention of permanently severing all earthly ties, he does not ipso facto become divested of his property. Each case must be judged upon its merits and in the light of its special circumstances; in a particular instance there might be ample evidence that a candidate for ordination intended to be what is known as dullaba rahan (56).

The present position of a Burman Buddhist when he becomes a rahan, and there is no intention or evidence to show that his renunciation of a worldly life is only temporary, may thus be summarised:-

(54) Ma Nyun Sein v. Maung Chan Mya, (1921) 11 L.B.R.124.
(55) Civil First Appeal No.156 of 1935;
see also O.H.Mootham, Burmese Buddhist Law, 137.
(56) i.e. a person who becomes a monk for a limited period.

(1) A phongyi after ordination has no interest in property which he possessed prior thereto, and consequently he has, after ordination, no power to dispose of such property (57).

(2) A phongyi cannot inherit to his lay relatives nor can his lay relatives inherit to him, for, after ordination, the ties of kinship are severed (58), and his right of inheritance having once been lost, it cannot be revived by the renunciation of his religious vows after the death of the relative in question (59).

(3) If a phongyi returns to civil life he has no interest in his former property unless the latter be returned to him in some overt manner as, for instance, by conveyance or gift from those who would be legally in possession thereof, or by his resuming his property from them in some legal and valid fashion (60).

---

(57) Ma Pwe v. Maung Myat, (1897) II U.B.R.(1897-01) 54;
A.R.L.P. Firm v. U Po Kyaing, (1939) Rgn.L.R.311 (F.B.);
U Arzeina v. Ma Kyin Shwe, (1940) Rgn.L.R.668.

(58) Mg.Pwe v. U Ingya, (1918) III U.B.R.91;
Shwe Ton v. Tun Lin, (1918)9 L.B.R.220 (F.B.)
A.R.L.P. Firm v. U Po Kyaing, (1939) Rgn.L.R.311 (F.B.)

(59) Mg.Ni v. Mg.Thet She, (1922) 4 U.B.R.159.

(60) Ma Shwe The v. Mg.Kan, (1923) 1 Ran.430;
Followed in Ma Ngun Sein v. Mg.Chan Mya, (1921) 11 L.B.R.124
A.R.L.P. Firm v. U Po Kyaing, (1939) Rgn.L.R.311 (F.B.).

CHAPTER XVII

ADMINISTRATION AND NATURE OF THE ESTATES OF INHERITANCE.

The Hindu joint family is a development from the Aryan patriarchal family, in which, within the family, all property rights vested in the patriarch, whose powers over all matters were absolute. Though some Dhammathats speak of the husband as being 'Lord of the wife' and give him a limited right to chastise her, he never at any time had anything approaching patria potestas as in Hindu Law. In Burma, it was the parents, not the patriarch who gave the daughter in marriage. In Burma, after the spouse relict, the children irrespective of sex, are the heirs; there is no religious basis for the rule, whereas in Hindu Law the principle that the nearest agnate inherits struggles with the principle that the heir is he who confers the greatest spiritual benefit to the deceased.

The Hindu Law and Burmese Law of successions are based on fundamentally different conceptions as to what the social unit is, the status of the unit, and the nature of the rights and obligations between the members of the unit and is not part and parcel of a larger unit, the family. The household has its own separate property and incurs separate and distinct liabilities. The father or the grandfather, though held in respect and high consideration, does not have any rights to the property of the members of the separate households within the

joint family which form the foundation of the Hindu society. The different members of the Burmese family are not required to dwell in the same house, possess property, animate and inanimate, in common, and transact business by common consent as are required of the members of the Hindu joint family. The joint family consists of a large number of members because not only the parents, children, brothers, sisters, their spouse and children live together, but it may include descendants and collaterals. Over them, the senior male agnate originally held almost unlimited ~~sawy~~ sway so far as family matters are concerned. He is obeyed implicitly, transacts business, and has the final say in matters such as marriage, adoption, etc. "Three persons are independent in the world: a king, a spiritual teacher and in all castes successively a householder in his own household (1)." It is true that the mother holds a high place in the family, and Manu concedes a greater right to veneration to her than even the father. "The teacher (akarya) is ten times more venerable than a sub-teacher (upadhyaya), the father a hundred times more than the teacher, but the mother a thousand times more than the father (2)." But the rule refers to venerability and applies to the mother of sons only.

The Hindu law of succession seems to have developed from the assumption that only agnate males possessed property rights.

(1) Nārada, 1. 32.
(2) Manu, 11 - 145.

Originally succession was probably by survivorship only. The right to separate property had to be developed before succession by inheritance was recognised, and even then the main rule was that the nearest male agnate succeeded. Before the development of rules of inheritance, it is possible that the widow of the senior male agnate took his place for her life, at least in parts of India. When rules of inheritance were developed, the widow took a life estate in the absence of male agnate descendants, before the separate property passed to her husband's heirs. Though the position of women in the Hindu system was palliated by the recognition of stridhana, in general, they only had the right to be maintained out of the joint-property, or the property inherited from their male relations. The number of female heirs to a male's separate property is strictly limited (3).

During the centuries, there was a tendency to limit the powers of the head of the family, to liberalise the right to partition, to give increasing recognition to separate property and more consideration to women's rights, but the Hindu Law is still clearly marked with signs of its origin. It differs a great deal from the Burmese law of inheritance which starts with the assumption of husband and wife bringing property to the marriage, in which they have mutual and egalitarian rights,

---

(3) See Mayne on Hindu Law and Usage, 729.

each bringing the other heirs, and the children next, with no discrimination in rights of inheritance between male and female, agnates or cognates (4).

The assumption made in Mi Pyu v. Ma Bon Dok (5), as also in Maung Tun v. Maung Taw (6) that the individed ancestral estate enjoyed in common by Burmese co-heirs possesses the incidents of a joint family was questioned in Mi Lan v. Mg.Shwe Daing (7) and U Guna v. U Kyaw Gaung (8). Birks, J.C., said,

"There is nothing in Buddhist Law corresponding with the Hindu Law according to the Mitakshara School, where when one of the co-parceners drops out on death he leaves absolutely nothing behind him, his interest in the joint estate merely swelling the interest of the co-parceners who outlive him. There seems to be no mention of survivorship in the Buddhist Dhammathats. Inheritance is spoken of throughout."

Chari, J. in Maung Ba Tu v. Ma Thit Su (9) makes it clear that there is no analogy between the position of Burmese co-heirs in an ancestral estate and that of the co-parceners of a joint Hindu family; while the Hindu law contemplates the family as a unit comprising joint owners of an estate with the incident of survivorship, the Burmese heir cannot, as such, be

(4) Dhammavilâsa, XIV, 3.
(5) (1874) S.J. 35.
(6) (1894) P.J. 132.
(7) (1893) II U.B.R. (1892-96) 121.
(8) (1895) II U.B.R. (1892-96) 204.
(9) (1927) 5 Ran. 758. 785.

deemed to be, with his co-heirs, a joint tenant of the ancestral estate, he being vested separately and individually with a definite fractional share in the property.

Partition in Burmese Buddhist Law is used in its general sense of division or separation of interest in property. Since, however, the estate of a Burman Buddhist does not, on his death, vest in his heirs collectively but each of the latter obtains a vested interest in a definite fraction of the estate, an heir is not entitled to maintain a partition suit in the strict sense, but an administration suit (10).

The Burma Laws Act, 1898, enacts that the Law applicable to Buddhists on questions regarding succession, inheritance, marriage, caste or any religious usage or institution shall be the Buddhist Law, 'except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.' Such rules of limitation in the Dhammathats as are repugnant to the provisions of the Limitation Act, will, accordingly, not be enforced (11); and this principle has been followed in the cases of Mi Min Ku v. Tha Myun (12), Maung Po

(10) Mg.Ba Tu v. Ma Thet Su, (1927) 5 Ran.785; affirmed on appeal: Civil 1st Appeal No.294 of 1927, High Court, Rangoon; see also O.H.Mootham, Burmese Buddhist Law, 86.
(11) Mi Paing v. Mi Tue, (1875) S.J. 1875. 51.
(12) (1892) 2 U.B.R. (1892-96) 9.

Min v. U Shwe Lu (13), and must be regarded as settled law.

Regarding the question which Article of the Limitation Act applies to claims for shares of inheritance at the Buddhist Law, in Maung Tun v. Maung Taw (14), Aston J.C., without expressly deciding that article 127 would apply, said: "When a Burman Buddhist dies, a suit brought by heirs to recover their specific share in the property left by him (and owned by him until his death) according to the law of inheritance and succession as regulated by marriage and descent, is a suit which may be correctly viewed as one to recover a share in property which has become the joint ancestral property of the heirs and successors after the death of that Burman Buddhist, and which is

---

(13) (1903) 2 L.B.R. 110.

(14) (1894), P.J.132.
Article 123 provides, "To suits for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate the period of limitation is twelve years, and time begins to run from when the legacy or share becomes payable or deliverable therein.
Article 127 provides, "To suits by a person excluded from joint family property to enforce a right to share therein, the period of limitation is twelve years, and time begins to run from when the exclusion becomes known to the plaintiff.

only in some special and figurative sense the property of that deceased ancestor." This view has been doubted in Mg. Tha Su v. Maung Paw (15). The later Dhammathats e.g., Manugye, do not appear to contemplate a Buddhist estate as a joint family estate, in the Hindu sense of the term; and it is at best very doubtful if the older Dhammathats ever contemplated a Buddhist estate as a joint family estate. Having in view of the consensus of rulings in the Indian High Courts that when property is spoken of as belonging to a joint family, it must primarily refer to a Hindu joint family and only secondarily to such groups as non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family (16), the Upper Burma view that Article 127 will not apply to the claim for distributive shares of a deceased Burmese Buddhist's estate seems to be the correct view (17).

The question then arises, whether Article 123 would apply. In Maung Tun v. Maung Taw (18), Aston, J.C., said,

"The term intestate is scarcely appropriate when applied to a Burman Buddhist who has no testamentary power and cannot dispose of his property by will." In the later case of Maung Aung Ge v. Ma Hla Win (19), where the claim was for the children's shares in the estate of the parents, it was held that Article 123

(15) (1896) II U.B.R. (1897-01) 458.
(16) Isap Ahmed v. Abramji Ahmadji, (1917) 41 Bom., 588 (F.B.).
(17) See U May Oung, Leading Cases on Buddhist Law, 316.
(18) (1894) P.J. 132.
(19) (1895) P.J. 115.

would apply and that the suit unless brought within 12 years of the death of the propositus would be barred. The dictum of Aston, J.C., was considered by the Special Court in Ma Nyein Aung v. Ma So Zu (20), where the learned Judges said, "We have been referred to the case of Maung Tun v. Ma Taw, in which the learned Judicial Commissioner suggested a doubt whether the term intestate was appropriate to a Buddhist who has no testamentary power. We are disposed to think that an intestate means a person who dies without leaving a will and that it may include a person who has no power to make one. This opinion derives support from the use of the word intestate in those parts of the Probate and Administration Act which applies to Buddhists."

In Anleatham v. Mg. Tha Ta U (21), Birks, J.C., held that the article applicable to the suit by the eldest daughter for a quarter share on her father's death would be Article 123, a view which was followed in U Po Min v. U Shwe Lu (22) where the orasa claimed his quarter share. In Maung Tun U v. Myat Than Zan (23), it was held that a suit for a share of the estate left by a deceased grand-parent would be governed by the article 123. In San Pe v. Ma Shwe Zin (24), Article 123 was

(20) (1898) P.J., 530.
(21) (1899) P.J., 625.
(22) (1903) 2 L.B.R.110.
(23) (1913) 6 B.L.T. 188.
(24) (1915) 9 L.B.R. 176.

applied to a claim against a step-parent, on the death of the parent. In Tun Tha v. Ma Thit (25), and its offshoot Maung Pan On v. Mg. Tun Tha (26), it was held that the orasa share vests on death of one parent and he or she can bring a suit for his or her share within the period allowedby Article 123. The same article applies to a suit for a share on re-marriage of one parent (27).

As certain Indian decisions maintain that Article 123 does not apply to a suit by one co-heir against other co-heirs, but applies only to suits against administrators and executors, the question was fully discussed by a Bench of the High Court in the case of Maung Po Kin v. Maung Shwe Bya (28). The learned Judges held that a suit for a share of the corpus of the estate left by a Burmese Buddhist would be governed by Article 123. In Ma Pwa Thin v. U Nyo (29) it was held that these Rangoon cases must be deemed to be over-ruled by the pronouncement of the Privy Council in Gulam Hussein's case (30) that Article 123 only applies where the suit is brought against an executor or administrator or some persons legally charged

(25) (1915) 9 L.B.R. 56 (P.C.).
(26) (1924) 11 L.B.R. 176.212.
(27) Ma E Mya v. U Pe Lay, (1925) 3 Ran.281.
(28) (1923) 1 Ran.405.
(29) (1934) 12 Ran.409.
(30) Gulam Mohammed v. Gulam Hussein, (1931) 59I.A.74.

with the duty of distributing the estate, and that in a case between several co-heirs of an intestate the article applicable would be Article 144 and not Article 123. This ruling was followed in Ma Nyun v. Ma Chan Mya (31) where it was held that a suit for shares of inheritance by children and grandchildren of a deceased Burmese Buddhist against their co-heirs is governed by Article 144 of the Limitation Act and not by Article 123. This is the present position in Burma. The re-marriage of a surviving parent gives the eldest child a fresh right and starts a new period of limitation (32).

When, however, the property is in the hands of alienees from one of the heirs or the administrator, the proper articles to apply would be Articles 142 or 144, according as whether the plaintiffs whilst by themselves or their agents in possession

(31) (1949) B.L.R. 420.
Article 144 provides 'to suits for possession of immoveable property or any interest therein not hereby otherwise specially provided for, the period of limitation is twelve years and time begins to run as from when the possession of the defendant becomes adverse to the plaintiff.'

(32) U Tauk Ta v. Ma Ohn Yin, (1939) Rgn.L.R.217.

have been dispossessed or not, after the co-heirs amongst whom the plaintiff was, had gone into possession (33).

Section 218 of the Succession Act, 1925, provides that where the deceased has died intestate, administration of his estate may be granted to any person who according to the rules for the distribution of an estate of the intestate applicable in the case of such deceased would be entitled to the whole or any part of the deceased's estate. Accordingly, where the claimant for letters is a person entitled to inherit and is under no positive disqualification and in the absence of an application by other persons equally entitled the application would not be refused (34).

Thus in Nga San v. Ma Nya (35) where the claimants were a step-son and a sister, of the deceased, and in Maung Sa So v. v. Ma Paw (36), where the contest was between a step-son and a brother, the step-son was granted letters in the absence of any natural child, he being, in each case, the nearer heir.

On the above principle, it has also been laid down that as a general rule the widow or the widower of a deceased person

---

(33) Mg.Tun v. Ma Taw, (1894) P.J.132;
Ma Nyi Ma v. Aung Myat, (1918) 12 B.L.T.27;
Maung Po Kin v. M.Shwe Bya, (1923) 1 Ran.405;
Article 142 provides, "to suits for possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, the period of limitation is twelve years and ~~xhxx~~ time begins to run from the date of dispossession or discontinuance."

(34) U May Oung, Leading Cases on Buddhist Law, 313.

(35) (1904) 2 U.B.R. ~~224~~. (1897-01) 531.

(36) (1902) 2 U.B.R. ~~(1897-01) 531~~ (1902-03) P & A. 7.

is the proper person to administer his or her estate and, where such person survives, letters of administration should not be granted to any other person, except for very strong reasons (37).

When rival applications for letters are made by persons who are equally entitled to the estate, "it shall be in the discretion of the Court to grant it to anyone or more of them" (38). Each case would be governed by the special facts therein; and rulings cannot give more than a general indication of how the direction should be exercised. In Ma Mya ~~May~~ Me v. Maung Ba Dun (39) where the claimants were an adopted daughter and a natural son, the Court on the ground that the adopted daughter lived with and assisted the mother in her business till her death, whereas the son lived separately and his conduct both to his mother and his adopted sister were reprehensible, granted the letters to the adopted daughter.

It must be remembered that those held by section 218 of the Act to be entitled to letters are persons, 'who must be shown to have an interest in the estate. It is not sufficient that

(39) (1904) 2 L.B.R. 224. ~~03) Probate~~, 7.
(38) Ma Mya Me v. Mg.Ba Tun, (1904) 224.
(37) Ne Win v. Ma Aung Gale, (1907) 4 L.B.R.293; followed in Mg.Ba Han v. Mg.Tun Yin, (1934) 12 Ran.629.

they may possibly have an interest (40)'. It hasfurther been held that, the words "rules for the distribution of the estate of an intestate" in section 218 of the Act must be taken to mean the ordinary and obvious rights of succession and inheritance. Thus, a person who claims that by the deceased living with him till death and by his performing the funeral ceremonies, he is entitled to a share in the estate would not be such a person; but in the absence of other claimants, he might succeed in his application as a creditor of the estate (41).

It sometimes happens that letters of administration are applied for by persons claiming to be adopted children of the deceased - usually as an inexpensive and summary method of establishing the disputed status. In such cases, the question whether the Courts should go into the consideration of the disputed adoption in the letters proceeding arises. In Ma Tok v. Ma Thi (42), it was held that where an application for letters of administration is made by a person who is by admitted relationship entitled under section 23 of the Probate and Administration Act (now section 218, Succession Act) to make it, and whom the Court considers to be otherwise a proper person to administer the estate, the Court ought not to allow the

(40) Ma Thi v. Shwe Hlaya,(1902) 1 L.B.R.284.
(41) Ma Pa v. Ma Pe, P.J. 622.
(42) (1907) 5 L.B.R.78.

proceedings to become protracted and costly by entering into disputed points such as adoption of other persons. Here, the claimants were a step-daughter and an alleged adopted daughter; in any case the step-daughter would be entitled to some share in the estate (43). But where the adoption, if proved, would exclude the other claimants from a share in the estate (e.g. where the claimants are an alleged adopted child and a brother or a nephew), the Courts would have to consider the question of adoption, unless the Court had grounds for exercising its discretion to act under section 254 of the Succession Act (44). In Mg.Sein v. U Po Toke (45) E. Maung, J., observed,

"The representation of a Burman Buddhist is not compulsory under the Succession Act, and the application appeared to have been made to have a decision on the disputed claims of Maung Sein

(43) (1907) 5 L.B.R.78.

(44) Aung Ma Khaing v. Mi Ah Bon,(1917) 9 L.B.R.163; Nga Ba Sin v. Nga Po Han,(1915)2 U.B.R.(1914-16) 101; Ma Thi v. Shwe Hlwa,(1902) 1 L.B.R.284.
Sec.254 provides: (1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of Burma, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person, who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.
(2) In every case such letters of administration may be limited or not as the Court thinks fit.

(45) (1947) R.L.R.312. See also Ma Ohn Nu v. Ma Nyun,(1948) B.L.R.329, where the observation of E Maung, J., in Mg.Sein v. U Po Toke,(1947) R.L.R.312 was referred to and approved.

and also of Daw Hnit settled in a cheap way. I am not prepared to encourage this method, especially in the circumstances of the present case."

Section 236 of the Succession Act lays down that letters of administration cannot be granted to a minor. Following section 246 of the Succession Act, it was held in Mg.Sein v. U Po Toke (46) that before letters can be granted for the use and benefit of the minor, the minor (or minors) must be entitled to the estate in exclusion to any other person and that the person applying for letters on their behalf must be such as been appointed by competent authority to be in charge of the minor's estate or failing such appointment a person appointed by Court.

Section 298 of the Succession Act provides that,

'Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Buddhist, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.'

It was thus held in Ma Ohn Nu v. Ma Nyun (47) that where an application for letters of administration is prima facie belated, it is incumbent upon the applicant to give full

(46) (1947) R.L.R. 312.
(47) (1948) B.L.R. 329.

reasons for the delay, otherwise, this alone may be a sufficient ground for the refusal of the Court to grant letters of administration as provided in section 298 of the Succession Act.

CHAPTER XVIII

CONCLUSION.

1. Nature of Burma's Debt to Hindu Law.

The debt of the Burmese jurists to the Dharmasastras lies in method of expression rather than in substance. They borrowed the magic name of Manu, and in order to claim authority for the customary law they were putting into writing, began their work by assigning, as the Hindu writers had done, a divine origin for it, but the legend used was different. They borrowed the eighteen types of Lawsuits expounded by Manu and used them as headings of chapters. In some instances, the Burmese writers borrowed whole texts verbatim from the Dharmasastras, and it was this which enabled Forchhammer to conclude that there was scarcely a text in Wagaru without its counterpart in the Dharmasastras, though, in fact, the Burmese jurists borrowed only those texts that were applicable to Burmese Buddhist Law. Only a limited number of rules of substantive Law were borrowed from the Hindu Codes. Once the Pali Dhammathats were written there was no reason to borrow from India or use the Dharmasastras as a pattern, and the substance of the Dhammathats became increasingly pure Burmese custom.

2. Absence of Hindu influence on the personal and family Law.

In regard to personal and family Law, it has been shown that to-day the Hindu system and Burmese system have very little in common. The present Burmese personal Law is unique, with an individuality of its own, and it is difficult to point to indications of indebtedness to Hindu Law.

The Hindu Law assumes the joint family as the unit of society. The law of the joint family is the basis of Hindu personal law; the law of marriage, of inheritance, have all to subserve the purposes of the joint family and accommodate themselves to the rules governing the joint family. In Burma the married couple and their children being the social unit, it is the law of marriage which is fundamental. A Burmese family is loosely knit by ties of blood and marriage, and usually consists of the father, the mother, and their unmarried sons and daughters. The sons, however, can leave the family even before marriage, on attaining the age of puberty (sixteen years of age), and the daughters on attaining the age of majority, but children usually only leave the family on marriage. Sometimes sons and daughters decide to remain with the family even after marriage, at least for some time. The head of the family is the father, and on his death, the mother succeeds to the headship of the family, as in Burmese Law the husband and wife are heirs to each other. The Law of divorce and the Law of inheritance, in fact every branch of the personal law,

assumes equality between the sexes, and the creation of a community of property between the spouses.

3. The Burmese Law of Marriage and Inheritance is the law common to whole of South-East Asia.

It has been possible to make a comparative study of the laws of the different countries in South-East Asia, namely Hindu Law, Ancient Indian Law, Kandyan and Thesawalamai Law of Ceylon, Law of Rembaus and ~~Menkbau~~ Menangkabau of Malaya and Sumatra, Khasis of Assam (India). The Dhammathats contain rules which obviously are adaptations of those in the Dharmasastras, but these are few compared with the bulk of the Dhammathat law which bears no relation to the Dharmasastras. The original Dhammathat writers must have been acquainted with Dharmasastras texts and adopted such portions of them as were applicable to the Burmese system. But the principal source of the Burmese Law of marriage and inheritance is the customary law of South-East Asia, for there are similar rules throughout South-East Asia, some of which were also followed in ancient India.

As to the origin of that law, if, as the historians suggest, the peoples of South-East Asia before the invasion of the Thais, and the Burmans were an Austro-Asian, matriarchal people, whether the law of South-East Asia is some sort of compromise or amalgam between the laws of the invaders and the matriarchal law of the indigenous peoples, is a question to which on the evidence at present available, it is difficult to

suggest an answer. It may be that an amalgam is stronger than its component units, but prima facie at least, a compromise between patriarchal and matriarchal marriage laws would seem unlikely to produce anything so robust as the property of the law of marriage of South-East Asia, which has so many centuries survived Chinese incursions and modern Hindu influence.

4. Conflict of Laws in the Courts of Burma.

The Courts set up after the British occupation experienced some difficulty in interpreting the precise scope of the personal law. Breach of promise, it was ultimately held, was a matter relating to marriage and so governed by the Burmese Law (1). Seduction, on the other hand, had nothing to do with marriage, so the Burmese Law, which might have awarded the woman compensation, and thereby rehabilitated her in public estimation did not apply (2). It has been suggested that the Burmese Courts should give the girl seduced a right of action to sue herself for damages. Guardianship is not governed by Burmese Law; the Guardians and Wards Act, 1890 applies to guardianship (3).

Another question was whether non-Burmese Buddhists were governed by the Burmese Law. Eventually it was held that

(1) Ma Yon v. Mg.Po Lu, (1900) II U.B.R.(1897-01) 499.
(2) Mi Kin v. Nga Myin Gyi, (1882) S.J.6. 119.
(3) Ma Thein Me v. Maung Po Gywe, (1913) 8 B.L.T.53.

for purposes of inheritance they were not (4) but in the nineteenth century, the position was obscure (5). Chinese immigrants, some of whom were Buddhists, were numerous; they were generally industrious, and many of them became wealthy. They frequently married Burmese women, who usually regarded them as desirable husbands, but the validity of such marriages was from time to time impugned in the Courts, which originally were disposed to hold that the customary Chinese wedding ceremonies were essential (6). Subsequently the position changed in favour of the Burmese woman (7),

The conflict of personal laws put the Burmese Buddhist woman in an unenviable position in regard to matters of marriage. Her marriage to a Christian was valid only if solemnised by a minister of religion legally competent to perform the ceremony, or by a Registrar of Marriages (8). A valid marriage with a Muslim was only possible if she had previously professed conversion to Islam (9), and, if she survived him, she was usually dismayed to discover what her rights of inheritance were.

Marriage with a Hindu other than a panchama was impossible (10). Nevertheless, unions between Burmese Buddhist women, and

(4) Phan Tiyok v. Lim Kyin Kauk, (1930) 8 Ran.57 (F.B.).
(5) U E Maung, Burmese Buddhist Law, 2.
(6) T. Wain Shein v. Ma Hnin Hlaing, (1910) 4 B.L.T.124.
(7) Ma Kyin Mya v. Mg.Sit Han, (1937) Ran.203
(8) Christian Marriage Act, 1872, Sec.5.
(9) Q.E. v. Nga Pale, (1899) P.J.607.
(10) S.Anamalay Pillai v. Po Lan, (1906) 3 L.B.R.228

foreigners became common, and though, in many cases, the woman entered into the association under no delusions as to her status, there were others in which she regarded herself as validly married. In any case, when the man died or broke off the association, she found herself without rights against him or his estate. It was only when the legislature became representative that legislation was enacted to improve her position. The Buddhist Women's Special Marriage and Succession Act, 1954 is applicable to every Buddhist woman and her non-Buddhist husband whatever his personal law (11). All questions relating to a marriage contracted under this Act must be decided according to the provisions of the Burmese Buddhist Law as though the parties were Burmese Buddhists. The Act does not cover Chinese Buddhists since it is applicable only to the non-Buddhist husbands of Burmese wives. It has been shown that a Chinese Buddhist may not dispose of his property by will if such disposal would be detrimental to the interests of his Burmese Buddhist heir or heirs.

5. Development of the Burmese Law in the Courts in Burma.

The Anglo-Burmese Courts applied the texts in the Dhammathats, or when they differed, those in the Dhammathats regarded as more authoritative, if they provided a rule governing the case; they developed new rules by analogy from the texts; some rules were rejected as contrary to British notions of 'justice, equity, and good conscience', and

(11) Sec.4 of Act 32 of 1954.

conflicts between the law in the Dhammathats and the statute law, particularly the procedural law, were resolved in favour of the latter.

It is held by the Court in Burma that at Burmese Buddhist Law, no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parents or guardians, or of the relation under whose protection she is living. Where there was no valid marriage to start with the irregular union may be converted into a valid marriage as from the time of the union, by the consent, express or implied, of the parents or guardians given to it afterwards (12). This decision remains unchallenged up to date. It has been pointed out that this view does not receive the support of the texts in the Dhammathats. It is submitted that the maxim quod fieri non debuit factum valet (that which ought not to be done is yet valid when done) should apply and that consent of the parents or guardian should not be a condition precedent for the validity of marriage, that guardianship, in so far as marriage is concerned, ~~is not a right but a duty~~ should not confer the right to veto but merely the right to give advice.

It is held by the Courts in Burma that a marriage ceremony is in itself not sufficient to create the marriage tie and that consumation is always essential to complete the status of

(12) Ma E Nyun v. Mg.Hla Min,(1925) 3 Ran.455 (F.B.)

husband and wife between the parties. It is submitted that the first part of the decision in Ma Hla Me's case (13) that the ceremony in itself is not sufficient to create the status of marriage is correct, but the second part of the decision that consumation is always a requisite of every Buddhist marriage is not justified by the texts of the Dhammathats cited by the learned Judge, nor was it in issue in the case. Here, as in connection with guardianship for marriage, the consequences of inaccurate translations of texts of the Dhammathats have been indicated.

Being unfamiliar with the concept of community of property, the Anglo-Burmese Courts found it difficult to find satisfactory answers to the questions in whom is management vested, to what extent may a spouse deal with the property of the marriage, to what extent is the property of the marriage liable to be taken in execution of a decree against one spouse, and what restrictions on the power of separate alienation are necessary to prevent the spendthrift spouse prejudicing the rights of the other. Admittedly the Dhammathats gave little assistance; legislation would have been necessary, and the British official, not without reason, regarded legislative interference with the personal law as dangerous.

The Courts rejected the obsolete texts vesting management in the husband. A trading couple usually operates in their

(13) Ma Hla Me v. Mg. Hla Baw, (1930) 8 Ran.425.

joint names, and in all transactions of importance, such as alienation of land, and borrowing money on a promissory note, the other party would usually insist, if that were necessary, on both spouses executing the necessary documents. It was when one spouse had incurred liability and the other spouse repudiated the transaction that difficulties arose. In the old Burmese Courts, the main object of the procedure in execution was to induce the debtor to pay, or someone to help h him. In particular, it was almost impossible to sell land outright but the procedural law in the Anglo-Burmese Courts, with negligible exceptions, empowered a creditor to levy execution by the attachment and sale of anything over which the debtor had a disposing power, and the Court actively assisted him in the process. In some cases on claims arising out of the action of one spouse, the Courts held that the spouses were in the position of partners, and so agents for each other (14), but they would not apply this to an alienation of immoveables (15), nor to an alienation by the husband of the wife's pre-nuptial property (16). In some cases they held that the interest of a spouse is liable to be taken in execution of his or her separate debt (17). The principle of partnership was at one time given unlimited application (18), but this

(14) R.M.S.Soobramonian Chetty v. Ma Hnin Ye,(1899) P.J.568.
(15) Mg.Twe v. Ramen Chetty, (1899) L.B.R.11.
(16) Ma Pyu U v. Mg.Po Kyun,(1901) 1 B.L.T.49.
(17) Ma Me v. Maung Gyi,(1892) II U.B.R.(1892-96)45.
(18) Ma Paing v. Mg.Shwe Hpaw,(1927) 5 Ran.298(F.B.).

doctrine was rejected in favour of the principle that each spouse had an attachable and alienable interest in the property of the marriage, equal to that which he or she would receive on a divorce by mutual consent (19). The community of property which marriage involves has thus become very precarious and the tendency is to substitute for it a mosaic of separate rights If it is desired to retain the conception of community, while providing solutions to the problems which it creates, no more can be done by development in the courts in the directions in which it has progressed during the British period. The only solution is by legislative enactments making possible a fresh approach to the whole subject; various remedies have been suggested.

With some hesitation, the Courts refused to allow ex parte divorce (20). In regard to divorce for desertion, they hesitated between the views that desertion was a matrimonial fault constituting a ground of action for divorce (21), that desertion for the prescribed period gave the deserted party an option to treat the marriage as dissolved (22), and that the marriage was automatically dissolved at the end of the prescribed period (23). Later, the second of these views was held to be correct (24).

(19) N.A.V.R.Chettyar Firm v. Mg.Than Daing, (1931) 9 Ran.524(F.B.)
(20) Mi Pa Du v. Mg.Shwe Bauk, (1891) S.J. L.B.607.
(21) Mg.So Min v. Ma Ta, (1892) S.J.610.
(22) Thein Pe v. U Pet, (1906) 3 L.B.R.175
(23) Ma Nyun v. Mg.San Thein, (1927) 5 Ran.537(F.B.)
(24) Dr.Tha Mya v. Daw Khin Pu, (1951) B.L.R.108 (S.C.).

The wife who complained that her husband had taken a second wife without her consent could, at best, only hope for a decree of judicial separation (25), but later, her right to divorce on this ground was recognised (26).

Divorce by mutual consent, being the commonest form, was naturally recognised. Divorce for a single act of cruelty was allowed, but the Courts refused to regard evidence of petty quarrels or of a single assault as establishing cruelty (27). The adultery of the wife was recognised as a ground for divorce, but other grounds recognised in the Dhammathats were ignored. The essential purpose of marriage is cohabitation and the procreation of children, so that incapacity to perform the sexual act is a ground for a declaration of nullity in the Hindu Marriage Act 1955. The same might be said of a marriage consent to which was obtained by force or fraud, or consent of a spouse whose idiocy or insanity is such as to make it impossible for the afflicted person to understand the nature of the act-in-law. It is suggested that legislation is necessary to enable Courts to grant decrees of nullity in circumstances similar to those set out in the Hindu Marriage Act 1955.

Burmese Buddhist Law contemplates the condonation of marital offence. It has been suggested that if we are going

---

(25) Ma In Than v. Mg. Saw Hla, (1881) S.J.103.
(26) Mg. Hme v. Ma Sein, (1918) 9 L.B.R.191 (F.B.)
(27) Mi Pa Du v. Mg. Shwe Bauk, (1891) S.J.L.B.607;
Ma Ein v. Te Naung (1907) 5 L.B.R. 87.

to introduce the English rule that a condoned matrimonial offence can be revived by the commission of a different matrimonial offence (28), must we not also bring with it other rules of English law? A condoned offence, in English law is revived by doing something less than what would amount to the condoned matrimonial offence; for instance adultery may be revived by amorous play with a person of the other sex. There is no obvious reason why the Burmese Buddhist Law should have different rules, for it can hardly be contended that condonation implies a license to commit matrimonial faults other than the one condoned. Condonation must mean restoring the erring spouse to the position he or she held before the offence was committed on condition that he behaves properly and abstains not only from the acts recognised as grounds for divorce but from other acts calculated to cause pain or distress to the condoning spouse.

The Dhammathats insisted that partition of property was an essential part of the proceedings in divorce, so that, if one party re-married before this was done, he or she forfeited all interest in the property of the marriage. The Anglo-Burmese Courts ultimately held that divorce and partition of property were two distinct causes of action (29) and usually applied the rules for partition or divorce by mutual consent to cases of divorce for a matrimonial fault (30).

(28) Richardson v. Richardson, (1950) P.16.
(29) Ma Gyan v. Mg.Su Wa, (1897) 2 U.B.R.(1897-01) 28.
(30) U E Maung, Burmese Buddhist Law, 102-3

Burmese Law does not recognise testamentary power. The spouse relict is the principal heir (31). In his or her absence, the estate of the propositus does not ascend if it can descend, and if it must ascend, it does so no higher than necessary. After application of these rules, the nearest relations of the propositus ordinarily exclude the more remote, equidistant relations taking equally irrespective of sex. Hence, unless and until the legislature is prepared to brush aside rights and interests peculiar and advantageous to the people of Burma, and enjoyed by them from time immemorial, and to ignore the clear injunctions of Buddhism that a man must make due provisions for his wife and children - meaning thereby all his wives and all his children - the introduction of the will, an instrument not without its advantages but yet capable of being used to injure and oppress, must, it would seem, be indefinitely postponed.

In Ma Hnin Yi v. Mg.Thin (32) it was held that the out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grand-parents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased one or both of the grandparents was the orasa child, and all that

(31) Digest I, Sec.310.
(32) (1940) Ran.32.

is necessary to show is that their parent was the eldest child of the grandparents. Prior to this decision the view had been generally held that the only grandchild who was entitled to share equally with his uncles and aunts was the out-of-time grandchild whose parent was the orasa. For the reasons which have been advanced earlier the rule laid down in the cases prior to the decision in Ma Hnyi Yi v. Mg.Thin (33) is, it is submitted, to be preferred. The earlier rule, it is conceived, is not only in accordance with the provisions of the Dhammathats as interpreted by authority, but provides a logical basis for what otherwise appears a purely arbitrary rule, for no reason has been suggested why a special share should be given to one grandchild in preference to the others except on the ground that the grandchild's own parent is himself in a privileged position.

Thus some of the more obvious omissions and confusions in Burmese Law have been pointed out and improvements in the law have been suggested. If it is desired to bring the Burmese Law in line with the well-established principles contained in the Dhammathats in so far as they have not become obsolete through conflict with the current notions of modern Buddhist society in Burma, it is submitted that such confusions and omissions in the law must be rectified by legislation. It is hoped that the discussions

---

(33) (1940) Ran.32.

in this Thesis will prove useful not only in connection with problems arising out of the law as it stands at present in Burma, but also to the legislature, when time comes for rectification or codification of Burmese Buddhist Law.

APPENDIX I

Matrimonial Causes Act, 1950.

An Act to consolidate certain enactments relating to matrimonial causes in the High Court in England and to declarations of legitimacy and of validity of marriage and of British nationality, with such corrections and improvements as may be authorised by the Consolidation of Enactments (Procedure) Act, 1949.
(28th July, 1950)

Divorce and Nullity of Marriage.

1. Grounds for petition for divorce. - (1) Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent -

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition;

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment -

(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, or of any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, or is being detained as a Broadmoor patient or in pursuance of an order made under the Criminal Lunatics Act, 1884;

(b) while he is detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919;

(c) while he is detained in pursuance of any order for his detention or treatment as a person of unsound mind or a person suffering from mental illness made under any law for the time being in force in Northern Ireland, the Isle of Man or any of the Channel Islands (including any such law relating to criminal lunatics);

(d) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, or under any such law as is mentioned in paragraph (c) of this sub-section, being treatment which follows without any interval a period during which he was detained as mentioned in paragraph (a), paragraph (b), or paragraph (c) of this sub-section;

and not otherwise.

2. Restriction on petitions for divorce during first three years after marriage. - (1) No petition for divorce shall be presented to the court unless at the date of the petition of the presentation three years have passed since the date of the marriage

Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree nisi do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration, of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interests of any children of the marriage and to the question of whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which has occurred before the expiration of three years from the date of the marriage.

(4) This section shall not apply in the case of marriages to which section 1 of the Matrimonial Causes (War Marriages) Act, 1944, applies (being certain marriages celebrated on or after the

third day of September, nineteen hundred and thirty-nine, and before the first day of June, nineteen hundred and fifty).

3. Provision as to making adulterer co-respondent. - (1) On a petition for divorce presented by the husband on the ground of adultery or in the answer of a husband praying for divorce on the said ground, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special ground from so doing.

(2) On a petition for divorce presented by the wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

4. Duty of court on presentation of petition. - (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is made against the petitioner.

(2) If the court is satisfied on the evidence that -

(a) the case for the petition has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not as in any manner been accessory to, or connived at, or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents;

the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty -

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(iii) where the ground of the petition is adultery or cruelty, or having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

5. Dismissal of respondent or co-respondent from proceedings. - In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

6. Relief to respondent on petition for divorce. - If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

7. Divorce proceedings after grant of judicial separation or other relief. - (1) a person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

8. Additional grounds for decree of nullity. - (1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground -

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1938, or subject to recurrent fits of insanity or epilepsy; or

(c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

Provided that, in the cases specified in paragraphs (b), (c), and (d) of this sub-section, the court shall not grant a decree unless it is satisfied -

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings were instituted within a year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

(2) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

9. Legitimacy of children of voidable marriages. - Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

10. Duties of King's Proctor. - In the case of any petition for divorce or for nullity of marriage -

(1) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;

(2) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney General considers necessary or expedient;

(3) if in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion.

11. Provisions as to costs where King's Proctor intervenes or shows cause. - (1) Where His Majesty's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce or for nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of so doing, as may seem just.

(2) So far as the reasonable costs incurred by His Majesty's Proctor in so intervening or showing cause are not fully satisfied by any order made under this section for the payment of his

costs, he shall be entitled to charge the difference as part of the expenses of his office, and the Treasury may, if they think fit, order that any costs which under any order made by the court under this section His Majesty's Proctor pays to any parties shall be deemed to be part of the expenses of his office.

12. Decree nisi for divorce or nullity of marriage. - (1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reasonof the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

(3) Where a decree nisi has been obtained and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

13. Re-marriage of divorced persons. - (1) Where a decree of divorce has been made absolute and either there is no right of appeal against the decree absolute or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, either party to the marriage may marry again.

(2) No clergyman of the Church of England or of the Church in Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife is still living, or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.

Judicial Separation and Restitution of Conjugal Rights.

14. Decree for judicial separation. - (1) A petition for judicial separation may be presented to the court either by the husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857, and the foregoing provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

(2) Where the court in accordance with the said provisions grants a decree for judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

15. Decree for restitution of conjugal rights. - (1) A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

(2) A decree for restitution of conjugal rights shall not be enforced by attachment.

Presumption of death and dissolution of marriage.

16. Proceedings for decree of presumption of death and dissolution of marriage. - (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, if he is domiciled

in England, present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and a dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) Sections 10 to 13 of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

(4) In determining for the purposes of this section whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

Declaration of Legitimacy, etc.

17. Declaration of legitimacy, etc. - (1) Any person who is a British subject, or whose right to be deemed a British subject depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by petition to the court for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

In this sub-section the expression "legitimated person" means a person legitimated by the Legitimacy Act, 1926, and includes a person recognized under Section 8 of that Act as legitimated.

(3) A petition under the last foregoing sub-section may be presented to a county court instead of to the High Court:

Provided that, where a petition is presented to a county court, the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court, and on such transfer the proceeding shall be continued in the High Court as if it had been originally commenced therein.

(4) Any person who is domiciled in England or Northern Ireland or claims any real or personal estate situate in England may apply to the court for a decree declaring his right to be deemed a British subject.

(5) Applications to the court (but not to a county court), under the foregoing provisions of this section may be included in the same petition, and on any application under the foregoing provisions of this section (including an application to a county court) the court shall make such decree as the court thinks just, and the decree shall be binding on His Majesty and all other persons whatsoever;

Provided that the decree of the court shall not prejudice any person -

(a) if it is subsequently proved to have been obtained by fraud or collusion; or

(b) unless that person has been cited or made a party to the proceedings or claims through a person so cited or made a party.

(6) A copy of every petition underthis section and of any affidavit accompanying the petition shall be delivered to the Attorney General at least one month before the petition is presented, and the Attorney General shall be a respondent on the hearing of the petition and on any subsequent proceedings relating thereto.

(7) In any application under this section such persons shall, subject to rules of court, be cited to see proceedings or otherwise summoned as the court shall think fit, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(8) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

Additional jurisdiction in proceedings by a wife.

18. Additional jurisdiction in proceedings by a wife. - (1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say -

(a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time bring in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England;

(b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

(2) Without prejudice to the jurisdiction of the court to entertain proceedings under Section 16 of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings brought by a wife, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.

(3) In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.

Alimony, Maintenance and Custody of Children.

19. Alimony and maintenance in case of divorce and nullity of marriage. - (1) On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

(2) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sums of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable; and court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section.

(4) The foregoing provisions of this section shall have effect, in any case where a petition for divorce is presented by the wife on the ground of her husband's insanity, as if for the references to the husband there were substituted references to the wife, and for the references to the wife there were substituted references to the husband.

20. Alimony in case of judicial separation. - (1) On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

(2) On any decree for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just.

(3) The foregoing provisions of this section shall have effect, in any case where a petition for judicial separation is presented by a wife on the ground of her husband's insanity. as if for the references to the wife there were substituted references to the husband.

21. Wife's property and necessaries supplied to wife in case of judicial separation. - (1) In every case of judicial separation -

(a) any property which is acquired by or devolved upon the wife on or after the date of the decree whilst

the separation continues shall, if she dies intestate, devolve as if her husband had been then dead;

(b) if alimony has been ordered to be paid and has not been duly paid by the husband, he shall be liable for necessaries supplied for the use of the wife.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree shall be deemed to be property to which this section applies.

22. Alimony and periodical payments in case of restitution of conjugal rights. - (1) On any petition for restitution of conjugal rights, the court may make such interim order for the payment of alimony to the wife as the court thinks just.

(2) Where any decree for restitution of conjugal rights is made on the application of the wife, the court may make such order for the payment of alimony to the wife as the court thinks just.

(3) Where any decree for restitution of conjugal rights is made on the application of the wife, the court, at the time of the making of the decree or at any time afterwards may, in the event of the decree not being complied with within any time limited in that behalf by the court, order the respondent to make to the petitioner such periodical payments as the court thinks just, and the order may be enforced in the same manner as an order for alimony.

(4) Where the court makes an order under the last foregoing sub-section, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties.

23. Additional power of court to make orders for maintenance. - (1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court.

24. Power of court to order settlement of wife's property. - (1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them.

(2) Where a decree for restitution of conjugal rights is made on the application of the husband, and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the benefit of the petitioner and of the children of the marriage or either orany of them, or may order such part of the profits of trade or earnings as the court thinks reasonable to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage or either or any of them.

25. Power of court to make orders as to application of settled property. - The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage.

26. Custody and maintenance of children. - (1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper

proceedings to be taken for placing the children under the protection of the court.

(2) On an application made in that behalf, the court may, in any proceedings for restitution of conjugal rights, at any time before final decree, or, if the respondent fails to comply therewith, after final decree make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

(3) On any decree of divorce or nullity of marriage, the court shall have power to order the husband, and on a decree of divorce made on the ground of the husband's insanity, shall also have power to order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties:

Provided that the term for which any sum of money secured for the benefit of a child shall not extend beyond the date when the child will attain twenty-one years of age.

27. Payment of alimony and maintenance to trustees and persons having charge of respondent. - (1) In any case where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or the husband, as the case may be, or to a trustee approved by the court on her, or his behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient so to do.

(2) In any case where -

(a) a petition for divorce or judicial separation is presented by a wife on the ground of her husband's insanity; or

(b) a petition for divorce, nullity or judicial separation is presented by a husband on the ground of his wife's insanity or mental deficiency,

and the court orders payments of alimony or maintenance under Sec.19 or Sec.20 of this Act in favour of the respondent, the

court may order the payments to be made to such persons having charge of the respondent as the court may direct.

28. Variation and discharge of orders for alimony and maintenance. - (1) Where the court has made an order under Sec.19, Sec.20, Sec.22, Sec.23 or Sub-Sec.(2) of Sec.24 of this Act, the court shall have power to discharge or vary the order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended:

Provided that in relation to an order made before the 16th day of December, 1949, being an order which, by virtue of Sub-Sec.(2) of Sec.34 of this Act, is deemed to have been made under Sub-Sec.(2) of Sec.19 of this Act, the powers conferred by this section shall not be exercised unless the court is satisfied that the case is one of exceptional hardship which cannot be met by the discharge, variation or suspension of any order made, or deemed as aforesaid to have been made, under Sub-Sec.(3) of the said Sec.19.

(2) The powers exercisable by the court under this section in relation to any order shall be exercisable also in relation to any deed or other instrument executed in pursuance of the order.

(3) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.

29. Commencement of proceedings for maintenance, settlement of property, etc. - When a petition for divorce or nullity of marriage has been presented, proceedings under Secs.19, 24, 25 or Sub-Sec.(3) of Sec.26 of this Act may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition:

Provided that no order under any of the said sections or under the said sub-section (other than an interim order for the payment of alimony under Sec.19) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution, or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.

Miscellaneous.

30. Damages for adultery. - (1) A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.

(2) A claim for damages on the ground of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857, and the provisions of this Act with reference to the hearing and decisions of petitions shall so far as may be necessary apply to the hearing and decision of petitions on which damages are claimed.

(3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

31. Power to allow intervention on terms. - In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

32. Evidence. - (1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.

(3) The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

(4) In any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard in camera unless in any case the judge is satisfied that in the interest of justice any such evidence ought to be heard in open court.

Interpretation, Repeal and Short Title.

33. Interpretation. - In this Act the expression "the court" means the High Court, except that in Sec.17, where the context so requires, it means or includes a county court, and the expression "prescribed" means prescribed by rules of court.

34. Repeal and savings. - (1) The enactments set out in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(2) Without prejudice to the provisions of Sec.38 of the Interpretation Act, 1889 -

(a) nothing in this repeal shall affect any order made, direction given or thing done, under any enactment repealed by this Act or the Supreme Court of Judicature (Consolidation) Act, 1925, or deemed to have been made, given or done respectively under any such enactment, and every such order, direction or thing shall if in force at the commencement of this Act continue in force, and, so far as it could have been made, given or done under this Act, shall be deemed to have been made, given or done under the corresponding provision of this Act;

(b) any other order in force at the commencement of this Act which could have been made under any provisions of this Act shall be deemed to have been so made;

(c) any document referring to any Act or enactment repealed by this Act or the said Act of 1925 shall be construed as referring to this Act or to the corresponding enactment in this Act;

(d) for the purposes of the India (Consequential Provision) Act, 1949, this act shall be deemed to have been in force on the 26th day of January, 1950.

35. Short title commencement and extent. - (1) This Act may be cited as the Matrimonial Causes Act, 1950.

(2) This Act shall come into operation on the 1st day of January, 1951.

(3) This Act shall not extend to Scotland or Northern Ireland.

APPENDIX No.II

THE SPECIAL MARRIAGE ACT, 1954.

No.43 of 1954

9th October,1954.

An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

Be it enacted by Parliament in the Fifth Year of the republic of India as follows:-

CHAPTER I

PRELIMINARY.

1. Short title, extent and commencement. - (1) This Act may be called the Special Marriage Act, 1954.

(2) It Extends to the whole of India except the State of Jammu and Kashmir, and applies also to citizens of India domiciled in the territories to which this Act extends who are outside the said territories.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Note:- The Act was published in the Gazette of India extraordinary, Part II Section I dated the 11th Oct.,1954 and received the assent of the President on the 9th Oct.,1954.

2. Definitions. - In this Act, unless the context otherwise requires:-

(a) "consular officer" means a consul-general, consul, vice-consul, pro-consul or consular agent;

(b) "degrees of prohibited relationship" - a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedule are within the degrees of prohibited relationship;

Explanation I. - Relationship includes, -

(a) relationship by half or uterine blood as well as by full blood;

(b) illegitimate blood relationship as well as legitimate;

(c) relationship by adoption as well as by blood;

and all terms of relationship in this Act shall be construed

accordingly.

Explanation II - "Full blood" and "half blood" - two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives.

Explanation III. - "Uterine blood" - two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands.

Explanation IV. - In explanations II and III, "ancestor" includes the father and ancestress" the mother.

(c) "Diplomatic officer" means an ambassador, envoy, minister, charge d'affaires, high commissioner, commissioner or other representative, or a counsellor or secretary of an embassy, legation or high commission;

(d) "district", in relation to a marriage Officer, means the area for which he is appointed as such under sub-section (1) or sub-section (2) of section 3;

(e) "district court" means the principal civil court of original jurisdiction, and where there is a city civil court that court;

(f) "prescribed" means prescribed by rules made under this Act;

(g) "State government", in relation to a Part C State means the Lieutenant Governor or as the case may be, the Chief Commissioner of the State.

3. Marriage Officers. - (1) For the purposes of this Act, the State Government may, by notification in the Official Gazette, appoint one or more Marriage officers for the whole or any part of the State.

(2) For the purpose of this Act in its application to citizens of India domiciled in the territories to which this Act extends who are outside the said territories, the Central Government may, by notification in the official Gazette, -

(a) in the case of the State of Jammu and Kashmir, specify such officers of the Central Government as it may think fit to be the Marriage Officers for the State or any part thereof; and

(b) in the case of any other country, place or area, appoint such diplomatic or consular officers as it may think fit to be the Marriage Officers for the country, place or area.

CHAPTER II

SOLEMNIZATION OF SPECIAL MARRIAGES.

4. Conditions relating to solemnization of special marriages.- Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:-

(a) neither party has a spouse living;

(b) neither party is an idiot or a lunatic;

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degree of prohibited relationship; and

(e) where the marriage is solemnized outside the territories to which this Act extends, both parties are citizens of India domiciled in the said territories.

5. Notice of intended marriage.- When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.

6. Marriage Notice Book and publication.- (1) The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be

open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

7. Object to marriage. - (1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.

(2) After the expiration of thirty days from the date of which notice of an intended marriage has been published under sub-section (2) of section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary to the person making the objection and shall be signed by him or on his behalf.

8. Procedure on receipt of object. - (1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter or the objection and arriving at a decision.

(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer and appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court.

9. Powers of Marriage Officers in respect of inquiries. - For the purpose of any inquiry under section 8, the Marriage Officer shall have all the powers vested in a civil court under the Code of Civil procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and inspection;

(c) compelling the production of documents;

(d) reception of evidence on affidavits; and

(e) issuing commissions for the examination of witnesses;

and any proceeding before the Marriage Officer shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code (Act XLV of 1860).

Explanation - For the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the Marriage Officer shall be the local limits of his district.

(2) If it appears to the Marriage Officer that the objection made to an intended marriage is not reasonable and has not been made in good faith he may impose on the person objecting costs by way of compensation not exceeding one thousand rupees and award the whole or any part thereof to the parties of the intended marriage, and any order for costs so made may be executed in the same manner as a decree passed by the district court within the local limits of whose jurisdiction the Marriage Officer has his office.

10. Procedure on receipt of objection by Marriage Officer abroad. - Where an objection is made under section 7 to a Marriage Officer outside the territories to which this Act extends in respect of an intended marriage outside the said territories, and the Marriage Officer, after making such enquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer who shall act in conformity with the decision of the Central Government.

11. Declaration by parties and witnesses. - Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.

12. Place and form of solemnization. - (1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties, - "I, (A), take (B), to be my lawful wife (or husband)."

13. Certificate of marriage. - (1) When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signature of witnesses have been complied with.

14. New notice when marriage not solemnized within three months. - Whenever a marriage is not solemnized within three calendar months from the date on which notice thereof has been given to the Marriage Officer as required by Section 5, or where an appeal has been filed under sub-section (2) of Section 8, within three months from the date of the decision of the district court on such appeal or, where the record of a case has been transmitted to the Central Government under Section 10, within three months from the date of decision of the Central Government, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act.

CHAPTER III

REGISTRATION OF MARRIAGES CELEBRATED IN OTHER FORMS

15. Registration of marriages celebrated in other forms. - Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (III of 1872), or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:-

(a) ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration;

(d) the parties have completed the age of twenty one years at the time of registration;

(e) the parties are not within the degrees of prohibited relationship;

Provided that in the case of a marriage celebrated before the commencement of this Act, this conditionshall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and

(f) the parties have been residing withinthe district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

16. Procedure for registration. - Upon receipt of an application signed by both the parties to the marriage for the registration of their marriage under this Chapter, the Marriage Officer shall give public notice thereof in such manner as may be prescribed and after allowing a period of thirty days for objections and after hearing any objection received within that period, shall, if satisfied that all the conditions mentioned in Section 15 are fulfilled, enter a certificate of the marriage in the Marriage Certificate Book in the form specified in the Fifth Schedule, and such certificate shall be signed by the parties to the marriage and by three witnesses.

17. Appeals from orders under Section 16. - Any person aggrieved by any order of a Marriage Officer refusing to register a marriage under this Chapter, may within thirty days from the date of the order, appeal against that order to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer to whom the application was made shall act in conformity with such decision.

18. Effect of registration of marriage under this Chapter. - Subject to the provisions contained in sub-section (2) of section 24, where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always have been the legitimate children of their parents:

Provided that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents in any case where, but for the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents.

CHAPTER IV

CONSEQUENCES OF MARRIAGE UNDER THIS ACT

19. Effect of marriage on member of undivided family. - The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh and Jain religion shall be deemed to effect his severance from such family.

20. Rights and disabilities not affected by Act. - Subject to the provisions of section 19, any person whose marriage is solemnized under this Act, shall have the same right and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (XXI of 1850) applies.

21. Succession to property of parties married under Act. - Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (XXXIX of 1925), with respect to its application to members of certain communities, succession to

the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage ~~is~~ shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

CHAPTER V

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION.

22. Restitution of conjugal rights. - When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

23. Judicial separation. - (1) A petition for judicial separation may be presented to the district court either by the husband or the wife -

(a) on any of the grounds specified in section 27 (other than the grounds specified in clauses (i) and (j) thereof) on which a petition for divorce might have been presented; or

(b) on the ground of failure to comply with a decree for restitution of conjugal rights;

and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

(2) Where the court grants a decree for judicial separation it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

CHAPTER VI

NULLITY OF MARRIAGE AND DIVORCE

24. Void Marriages. - (1) Any marriage solemnized under this Act shall be null and void and may be so declared by a decree of nullity if -

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the district court has become final.

25. Voidable marriages. - Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if, -

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (IX of 1872):

Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied, -

(a) that the petitioner was at the time of the marriage ignorant of the fact alleged;

(b) that proceedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the court shall not grant a decree if,

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud has been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.

26. Legitimacy of children of void and voidable marriages. - Where a decree of nullity is granted in respect of any marriage under section 24 or section 25, any child begotten before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being declared to be null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this sectionshall be construed as conferring upon any child of a marriage which is declared to be null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but fort the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

27. Divorce. - Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent -

(a) has since the solemnization of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (Act XLV of 1860):

Provided that divorce shall not be granted on this ground, unless the respondent has prior to the presentation of the

petition undergone at least three years imprisonment out of the said period of seven years; or

(d) has since the solemnization of the marriage treated the petitioner with cruelty; or

(e) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(f) has for a period of not less than three years immediately preceding the presentation of the petition been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or

(g) has for a period of not less than three years immediately preceding the presentation of the petition been suffering from leprosy, the disease not having been contracted from the petitioner; or

(h) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(i) has not resumed co-habitation for a period of two years or upwards after the passing of decree for judicial separation against the respondent; or

(j) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent;

and by the wife on the ground that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

28. Divorce by mutual consent. - (1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both parties made not earlier than one year after the date of the presentation of the petition

referred to in sub-section (1) and not later than two years after the said date if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that marriage has been solemnized under this Act and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

29. Restriction on petitions for divorce during first three years after marriage. - (1) No petition for divorce shall be presented to the district court unless at the date of the presentation of the petition three years have passed since the date of entering the certificate of marriage in the Marriage Certificate Book.

Provided that the district court may, upon application being made to it, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the district court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the district court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition, without prejudice to any petition, which may be brought after the expiration of the said three years upon the same or substantially the same facts as those proved in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the district court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

30. Re-marriage of divorced person. - Where a marriage has been dissolved by a decree of divorce, and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, and one year has elapsed thereafter but not sooner, either party to the marriage may marry again.

CHAPTER VII

JURISDICTION AND PROCEDURE.

31. Court to which petition should be made. - (1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

(2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories.

32. Contents and verification of petitions. - (1)Every petition under Chapter V or Chapter VI shall state, as the nature of the case permits, the facts on which the claim to relief is founded, and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statement contained in every such petition shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

33. Proceedings may be in camera. - A proceeding under this Act shall be conducted in camera if either party thereto so desires or if the district court so thinks fit to do.

34. Duty of court in passing decrees. - (1) In any proceeding under Chapter V or Chapter VI, whether defended or not, if the court is satisfied that -

(a) any of the grounds for granting relief exists; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) when divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and

(d) the petition is not presented or prosecuted in collusion with the respondent; and

(e) there has not been any unnecessary or improper delay in instituting the proceeding; and

(f) there is no other legal ground why the relief should not be granted;

then and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

35. Relief to respondent on petition for divorce. - If in any proceeding for divorce, the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

36. Alimony pendente lite. - Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income, it may seem to the court to be reasonable.

37. Permanent alimony and maintenance. - (1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree, or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability and the conduct of the party, it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it shall rescind the order.

38. Custody of children. - In any proceeding under Chapter V or Chapter VI the district court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending.

39. Enforcement of and appeal from decrees and orders. - All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the law for the time being in force;

Provided that every such appeal shall be instituted within a period of ninety days from the date of decree or order.

40. Application of Act V of 1908. - Subject to the other provisions contained in this Act, and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V 1908).

41. Power of High Court to make rules regulating procedure. - (1) The High Court shall, by notification in the Official Gazette, make such rules consistent with the provisions contained in this Act and the Code of Civil Procedure, 1908 (Act V of 1908), as it may consider expedient for the purpose of carrying into effect the provisions of Chapters V, VI and VII.

(2) In particular, and without prejudice to the generality of the foregoing provision, such rules shall provide for -

(a) the impleading by the petitioner of the adulterer as a co-respondent on a petition for divorce on the ground of adultery, and the circumstances in which the petitioner may be excused from doind so;

(b) the awarding of damages against any such co-respondent;

(c) the intervention in any proceeding under Chapter V or Chapter VI by any person not already a party thereto;

(d) the form and contents of petitions for nullity of marriage or for divorce and the payment of costs incurred by parties to such petitions; and

(e) any other matter for which no provision or no sufficient provision is made in this Act, and for which provision is made in the Indian Divorce Act, 1869 (IV of 1869).

CHAPTER VIII

MISCELLANEOUS

42. Saving. - Nothing contained in this Act shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage.

43. Penalty on married person marrying again under this Act. - Save as otherwise provided in Chapter III, every person who, being at the time married, procures a marriage of himself or herself to be solemnized under this Act shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code (Act XLV of 1860), as the case may be, and the marriage so solemnized shall be void.

44. Punishment of bigamy. - Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code (Act XLV of 1860), for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

45. Penalty for signing false declaration or certificate. - Every person making, signing or attesting any declaration or certificate required by or under this Act containing a statement which is false and which he either knows or believes to be false or does not believe to be true shall be guilty of the offence described in section 199 of the Indian Penal Code (Act XLV of 1860).

46. Penalty for wrongful action of Marriage Officer. - Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act -

(1) without publishing a notice regarding such marriage as required by section 5, or

(2) within thirty days of the publication of the notice of such marriage, or

(3) in contravention of any other provision contained in this Act, shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

47. Marriage Certificate Book to be open to inspection. - (1) The Marriage Certificate Book kept under this Act shall at all reasonable times be open for inspection and shall be admissible as evidence of the statement therein contained.

(2) Certified extracts from the Marriage Certificate Book shall, on application, be given by the Marriage Officer to the applicant on payment by him of the prescribed fee.

48. Transmission of copies of entries in marriage records.- Every Marriage Officer in a State shall send to the Registrar General of Births, Deaths and Marriages of that State at such intervals and in such form as may be prescribed, a true copy of all entries made by him in the Marriage Certificate Book since the last of such intervals, and, in the case of Marriage Officer outside the territories to which this Act extends the true copy shall be sent to such authority as the Central Government may specify in this behalf.

49. Correction of errors. - (1) Any Marriage Officer who discovers any error in the form or substance of any entry in the Marriage Certificate Book may, within one month next after the discovery of such error in the presence of the persons married or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin without any alteration of the original entry and shall sign the marginal entry and add thereto the date of such correction and the Marriage Officer shall make the like marginal entry in the certificate thereof.

(2) Every correction made under this section shall be attested by the witnesses in whose presence it was made.

(3) Where a copy of any entry has already been sent under section 48 to the Registrar General or other authority the

Marriage Officer shall make and send in like manner a separate certificate of the original erroneous entry and of the marginal corrections therein made.

50. Power to make rules. - (1) The Central Government in the case of diplomatic and consular officers and other officers of the Central Government, and the State Government, in all other cases, may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:-

(a) the duties and powers of Marriage Officers and the areas in which they may exercise jurisdiction;

(b) the manner in which a Marriage Officer may hold inquiries under this Act and the procedure therefor;

(c) the form and manner in which any books required by or under this Act shall be maintained;

(d) the fees that may be levied for the performance of any duty imposed upon a Marriage Officer under this Act;

(e) the manner in which public notice shall be given under Section 16;

(f) the form in which, and the intervals within which, copies of entries in the Marriage Certificate Book shall be sent in pursuance of Section 48;

(g) any other matter which may be or requires to be prescribed.

51. Repeals and savings. - (1) The Special Marriage Act, 1872 (III of 1872) and any law corresponding to the Special Marriage Act, 1872, in force in any Part B State immediately before the commencement of this Act are hereby repealed.

(2) Notwithstanding such repeal, -

(a) all marriages duly solemnized under the Special Marriage Act, 1872 (III of 1872), or any such corresponding law shall be deemed to have been solemnized under this Act;

(b) all suits and proceedings in causes and matters matrimonial which, when this Act comes into operation, are pending in any court, shall be dealt with and decided by such court so far as may be, as if they had been originally instituted therein under this Act.

(3) The provisions of sub-section (2) shall be without prejudice to the provisions contained in Section 6 of the General Clauses Act, 1897 (X of 1897), which shall also apply to the repeal of the corresponding law as if such corresponding law had been an enactment.

APPENDIX III

25 of 1955

18th May, 1955.

AN ACT to amend and codify the law relating to marriage among Hindus.

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:-

PRELIMINARY

1. (1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. (1) This Act applies -

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat, or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. - The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion,

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. In this Act, unless the context otherwise requires, -

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law, among Hindus in any local area, tribe, community group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(b) "district court" means, in any area for which there is a city civil court, that court, any in any other area the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(c) "full blood" and "half blood" - two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

(d) "uterine blood" - two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation. - In clauses (c) and (d), "ancestor" includes the father and "ancestress" the mother;

(e) "prescribed" means prescribed by rules made under this Act;

(f) (i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;

(g) "degrees of prohibited relationship" - two persons are said to be within the "degrees of prohibited relationship"

(i) if one is a lineal ascendant of the other; or
(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or
(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or
(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation. - For the purposes of clauses (f) and (g), relationship includes -

(i) relationship by half or uterine blood as well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly.

4. Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

HINDU MARRIAGES

5. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of marriage;

(ii) neither party is an idiot or a lunatic at the time of the marriage;

(iii) if the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(vi) where the bride has not completed the age of eighteen years, the consent of the guardian in marriage, if any, has been obtained to the marriage.

6. (1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:-

(a) the father;

(b) the mother;

(c) the paternal grandfather;

(d) the paternal grandmother;

(e) the brother by full blood; as between brothers the elder being preferred;

(f) the brother by half blood; as between brothers by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(g) the paternal uncle by full blood; as between paternal uncles the elder being preferred;

(h) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(i) the maternal grandfather;

(j) the maternal grandmother;

(k) the maternal uncle by full blood; as between maternal uncles the elder being preferred:

Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. (1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1) the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

9. (1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party -

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or

(c) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy; or

(d) [1] has, for a period of not less than three years immediately preceding) the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or

(e) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; of

---

[1] Substituted by the Hindu Marriage (Amendment) Act, 1956 (73 of 1956) section 2, for "has, immediately before".

(f) has, after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse.

Explanation. - In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE AND DIVORCE

11. Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

12. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1) no petition for annulling a marriage -

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if -

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1), shall be entertained unless the court is satisfied -

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(i) is living in adultery; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against the party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, -

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

14. (1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the

petition three years have elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petitionfor divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presemted but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and

void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code, shall apply accordingly.

18. Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v) and (vi) of section 5 shall be punishable -

(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(c) in the case of a contravention of the condition specified in clause (vi) of section 5, with fine which may extend to one thousand rupees.

JURISDICTION AND PROCEDURE

19. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. (1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

21. Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

22. (1) A proceeding under this Act shall be conducted in camera if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

23. (1) If any proceeding under this Act, whether defended or not, if the court is satisfied that -

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of sub-section (1) of section 10, or in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted,

then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

24. Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party inwhose favour an order has been made under this section has re-

married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of the original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

Provided that there shall be no appeal on the subject of costs only.

SAVINGS AND REPEALS

29. (1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or even to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained inthis Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

30. The Hindu Marriage Disabilities Removal Act, 1946, the Hindu Marriages Validity Act, 1949, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, the Bombay Hindu Divorce Act, 1947, the Madras Hindu(Bigamy Prevention and Divorce) Act, 1949, the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 and the Saurashtra Hindu Divorce Act, 1952 are hereby repealed.

APPENDIX IV

THE CHILD MARRIAGE RESTRAINT ACT.

(Act No. XIX of 1929).

An Act to restrain the solemnization of child marriages.

Whereas it is expedient to restrain the solemnization of child marriages; it is hereby enacted as follows:-

1. Short title extent and commencement. (1) This Act may be called "The Child Marriage Restraint Act 1928."

(2) It extends to the whole of British India, including British Baluchistan and the Sontal Parganas.

(3) It shall come into force from 1st April 1930.

2. Definitions. In this Act unless there is anything repugnant in the subject or context.

(a) "child" means a person who if a male is under eighteen years of age, and if a female is under fourteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party to a marriage" means either of the parties whose marriage is thereby solemnized; and,

(d) "minor" means a person of either sex who is under eighteen years of age.

3. Punishment for male adult below twenty-one years of age marrying a child. Whoever being a male above eighteen years of age and below twenty-one, contracts a child marriage,

shall be punished with fine which may extend to one thousand rupees.

4. Punishment for male adult above twenty-one years of age marrying a child. Whoever being a male above twenty-one years of age contracts a child marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees or with both.

5. Punishment for solemnizing a child marriage. Whoever performs, conducts, or directs any child marriage, shall be punishable with simple imprisonment which extend to one month or with fine which may extend to one thousand rupees o with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in a child marriage. (1) Where a minor contracts a child marriage any person having charge of the minor, whether as parent or guardian or in any other capacity lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees or with both:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this Section, it shall be presumed unless and until the contrary is proved that where a minor has contracted a child marriage the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

7. Imprisonment not to be awarded for offences under Section 3. Notwithstanding anything contained in Section 25 of the General Clauses Act 1897 or Section 64 of the Indian Penal Code, a Court sentencing an offender under Section 3 shall not be competent to direct that in default of payment of the fine imposed he shall undergo any term of imprisonment.

8. Jurisdiction under this Act. Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure 1898 no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act.

9. Mode of taking cognizance of offence. No Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnization of the marriage in respect of which the offence is alleged to have been committed.

10. Preliminary inquiries into offences under this Act. The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under Section 203 of the Code of Criminal Procedure 1898 either itself make an inquiry under Section 202 of that Code or direct a Magistrate of the First Class Subordinate to it to make such inquiry.

11. Power to take security from complainant. (1) At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall, except for reasons to be recorded in writing, require the complainant to execute a bond with or without sureties for a sum not exceeding one hundred rupees as security for the payment of any compensation to the complainant may be directed to pay under section 250 of the Code of Criminal Procedure 1898 and if such security is not furnished within such reasonable time as the Court may fix the complaint shall be dismissed.

(2) A bond taken under this Section shall be deemed to be a bond taken under the Code of Criminal Procedure 1898 and chapter XLll of the Code shall apply accordingly.

.....

APPENDIX. V

BUDDHISTS MARRIAGE AND DIVORCE BILL NO. OF 192.

Whereas it is expedient to define and amend the law relating to Marriage and Divorce amongst Buddhists; and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act under section 80A, sub-section (3) of the Government of India Act; it is hereby enacted as follows:

Part I.Preliminary.

1. Short title, extent and commencement. (1) This Act may be called the Buddhists Marriage and Divorce Act, 192.

(2) It shall extend to the whole of Burma but shall apply only to Buddhists.

(3) It shall come into force on such day as the Local Government may, by notification, direct.

2. Definitions. In this Act, unless there be anything repugnant in the subject or context -

(a) "eindaunggyi" means a person who marries again after dissolution of the first marriage either by death or divorce;

(b) "hnapazon property" includes -

(i) all profits or interests arising since marriage from the employment or investment of the separate property of either, and

(ii) all property acquired by their mutual skill and industry;

(c) "joint property" is the sum total of the hnapazon, payin and lettetpwa properties, and is impartible during the subsistances of the marriage;

(d) "lettetpwa property" means property acquired by the husband or wife after marriage and includes profits derived from the separate property of each;

(e) "payin property" is the property brought to the union by the husband and wife.

Part II. Marriage.

3. Conditiohs of valid marriage. After the commencement of this Act no marriage contracted between Buddhists shall be valid unless the following conditions are complied with, namely:

(i) the man must have completed the age of eighteen years and the woman the age of fourteen years;

(ii) there must not at the time be a valid marriage subsisting between either party and a third party;

(iii) both parties must be of sound mind;

(iv) the parties must not be related to each other in any degree of consanguinity set out in the Schedule;

(v) a bachelor or spinster must, if he or she has not completed the age of twenty years, have obtained the consent to the marriage of his or her father or, failing him, of his or her mother or, failing both, of his or her guardian de jure or de facto;

provided (a) that such consent may be either express or implied; (b) that such subsequent ratification

ratification shall operate so as to validate the union from the date of its commencement.

4. Ceremony not essential for marriage. Marriage may be effected by the parties agreeing to take each other as husband and wife. Living together openly as husband and wife shall be presumptive evidence of marriage.

5. Incidents of marriage relating to property. (1) A marriage shall operate so as to create an impartible or joint interest between the parties of all joint property.

(2) The interest of the parties in the joint property shall be determined as follows:

(a) in the case of the payin property, the party who brought it to the union shall have a two-thirds interest and the other party a one-third interest;

(b) in other cases, each party shall have one-half interest.

6. Disposal of joint property. Neither the husband nor the wife, acting independently of one another, may convey by way of sale, mortgage or gift the joint property, and no such conveyance, whether of the whole or part only of such property, shall be valid. Provided that the joint property shall be liable for the debts contracted and liabilities incurred by one party if the debts were contracted or the liabilities incurred on behalf of both parties or with the knowledge and consent, either express or implied, of the other party.

Provided also that it shall be presumed, in the absence

absence of evidence to the contrary, that debts contracted or liabilities incurred in the ordinary course of trade or business are contracted or incurred, as the case may be, on behalf of both parties.

Part III.Divorce.

7. When divorce follows automatically. Desertion for a period of three years by the husband and for one year by the wife shall effect a divorce automatically.

8. When divorce may be obtained. Divorce may be obtained -

(a) when the husband and wife mutually agree to a divorce;

(b) by a husband, on the ground of -

(i) adultery, or

(ii) the contracting of leprosy by his wife;

(c) by wife, on ground of -

(i) the contracting of leprosy by her husband, or

(ii) cruelty, which term includes legal and physical cruelty, on the part of her husband, or

(iii) her husband's remaining in the priesthood for seven days or more against her wishes.

9. Partition of property on divorce. (1) In the case of a divorce either by mutual consent or by reason of one of the parties contracting leprosy, the joint property shall be divided between the husband and wife in accordance with the interest of each party as defined in section 5, sub-section (2).

(2) In the case of a divorce effected automatically

automatically under the provisions of section 7, the deserting party shall forfeit all his or her interest in the joint property and shall also be liable for the payment of all joint debts.

(3) Where divorce is effected on account of adultery committed by the wife or on account of adultery coupled with cruelty, committed by the husband, the party at fault shall forfeit all his or her interest in the joint property and shall also be liable for the payment of all debts; provided that, where both parties are eindaunggyis, each party shall take back his or her payin property.

(4) Where divorce is effected on account of cruelty, each party shall be entitled to one half of the joint property.

(5) Where divorce is effected on account of the husband remaining in the priesthood for seven or more days against the wishes of his wife, the wife shall be entitled to all the joint property but she shall be liable for the payment of all joint debts.

.....

SCHEDULE

Section 3 (iv)

TABLE OF PROHIBITED DEGREES.

A man may not marry his	A woman may not marry her
1. Grandmother.	1. Grandfather.
2. Grandfather's wife.	2. Grandmother's husband.
3. Wife's grandmother.	3. Husband's grandfather.
4. Father's sister.	4. Father's brother.
5. Mother's sister.	5. Mother's brother.
6. Mother.	6. Father.
7. Step-mother.	7. Step-father.
8. Wife's mother.	8. Husband's father.
9. Daughter.	9. Son.
10. Wife's daughter.	10. Husband's son.
11. Son's wife.	11. Daughter's husband.
12. Sister.	12. Brother.
13. Son's daughter.	13. Son's son.
14. Daughter's daughter.	14. Daughter's son.
15. Son's son's wife.	15. Son's Daughter's husband
16. Daughter's son's wife.	16. Daughter's daughter's husband.
17. Wife's son's daughter.	17. Husband's son's son.
18. Wife's daughter's daughter.	18. Husband's daughter's son.
19. Brother's daughter.	19. Brother's son.
20. Sister's daughter.	20. Sister's son.

APPENDIX. VI

THE BUDDHIST WOMEN'S SPECIAL MARRIAGE AND SUCCESSION ACT.

Burma Act XXIV, 1939 (30th December 1939)

1. Commencement of Act. This Act shall come into force on the 1st April 1940.

2. Definitions. In this Act, unless there is anything repugnant in the subject or context -

(i) "a Buddhist Woman" means a woman belonging to any of the indigenous races of Burma, who professes the Buddhist faith; and

(ii) "Registrar" means a Registrar of Marriage under this Act.

3. Registrar of Marriages. (1) All village headmen shall be Registrars of Marriages under this Act and the Government may appoint any Magistrate to be a Registrar of Marriage for any area where there are no village headmen. The Registrars shall be supplied with notice forms and marriage certificate registers and shall be authorized to receive the fees chargeable under this Act.

(2) All Registrars shall be deemed to be public servants.

4. Marriage before whom solemnized. Notwithstanding the provisions contained in section 4 of the Christian Marriage Act, a marriage under this Act may be solemnized before a Registrar in the manner hereinafter provided.

5. Who may contract marriage. A man not below the age of 18 and a woman not below the age of 16 may contract a valid marriage provided -

(a) the parties are of sound mind,

(b) in the case of a party under the age of 20, the express consent of the father or mother, or if they be dead, of the guardian de facto or of the guardian de jurge, if any, has heen obtained,

(c) in the case of a woman, there is no valid subsisting marriage.

6. Notice of intended marriage. Whenever a non-Buddhist man and a Buddhist woman intend to contract a marriage they shall give notice in writing in the form prescribed in the Schedule to the Registrar within whose jurisdiction one of them has resided for 14 days before such notice is given. The notice form may be obtained from the Registrar on application.

7. Signing of declaration prescribed in notice. Any person giving notice under section 6 shall sign the declaration prescribed in the notice in the presence of two witnesses and the Registrar before whom the marriage is to be solemnized.

8. Fee. A fee of Rs.5 for every marriage shall be payable to the Registrar at the time of giving notice under section 6.

9. Publication of Notice. The Registrar shall cause the notice to be published -

(a) by affixing a copy thereof at some conspicuous place in his office; and

(b) by having a copy thereof served in the manner of service of summons or notices under the Code of

of Civil Procedure -

(i) if one of the parties is under 20 years of age, on the parent or guardian, as the case may be, of such party; and

(ii) if the woman had already married a man, on such man:

Provided that the Registrar may, if the residence of any person to be served with a copy of the notice is beyond the limits of his jurisdiction, send a copy to him by registered post or by a messenger.

The Registrar shall fill in the particulars in the certificate at the foot of the original notice in the prescribed form.

10. Solemnization of marriage if no objection. Fourteen days after notice of an intended marriage has been given under section 6 such marriage may be solemnized by the Registrar, unless it has been previously objected to in the manner hereinafter mentioned.

11. Objection. Any person may in writing addressed to the Registrar object to the intended marriage of which notice has been given on the ground that it would contravene one or more of the conditions prescribed in section 5.

12. Procedure on receipt of objection. Court of competent jurisdiction. (1) On receipt of the objection the Registrar shall refer the objector to a Court of competent jurisdiction and shall postpone the solemnization of the marriage for 14 days, if such Court be open at the time, and, if not, until the lapse of 14 days from the opening of such Court; provided

provided that the Registrar may on the application of the objector further postpone such solemnization for a period not exceeding 14 days on any ground which the Registrar may deem reasonable.

(2) The Court of competent jurisdiction under sub-section (1) shall be the District Court or the Original Side of the High Court within whose jurisdiction the Office of the Registrar is situated.

13. Application to Court for order as to whether intended marriage is or is not a proper marriage. (1) The objector may file an application before a Court of competent jurisdiction for an order as to whether such intended marriage is or is not a proper marriage.

(2) The Court shall give the applicant a certificate to the effect that such an application has been filed by him.

(3) If the certificate given by the Court is lodged with the Registrar within the time granted by him under sub-section (1) of section 12, the Registrar shall not solemnize the marriage unless and until he receives an order from the Court that it is a proper marriage.

If the certificate is not lodged with the Registrar within the time granted by him, the Registrar shall, if so desired by the parties solemnize the marriage.

(4) The Court shall after examining the allegations contained in the application and hearing the evidence produced by the parties in a summary way, decide whether the intended marriage is or is not a proper marriage and shall

shall pass an order accordingly. Such order shall be final.

(5) The Court shall forthwith send a copy of its order to the Registrar.

(6) If the Court orders that the intended marriage is a proper one, the Registrar shall, if so desired by the parties, solemnize it.

If the Court orders that the intended marriage is not a proper one, the Registrar shall not solemnize it.

14. Penalty for wrongful objection. Any Court in which an application under section 13 is filed may, if it appears that the objection is not reasonable and bona fide, inflict a fine not exceeding Rs.500 on the applicant and award the whole or any part of it to the parties to the intended marriage.

15. Petition where person whose consent is necessary is insane or unjustly witholds consent. Procedure on petition

If any person whose consent is necessary to any marriage under this Act is of unsound mind, or if any such person (other than the father) without just cause witholds his consent to the marriage, the parties intending marriage may apply by petition to a Court of competent jurisdiction, and such Court may examine the allegations in the petition in a summary way;

and, if upon examination, such intended marriage appears proper, such Court shall declare it to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage.

16. Manner of solemnization of marriage. Every marriage under this Act shall be solemnized in the presence of the Registrar and of two witnesses who shall attest the marriage certificate register referred to in section 17. It may be solemnized in any form provided that each party says to the other in the presence and hearing of the Registrar and of the witnesses "I, A.B., take thee, M.S., to be my lawful wife (or) husband."

17. Marriage Register. When the marriage has been solemnized as above, the Registrar shall enter the particulars in quadruplicate in a register called "The Marriage Certificate Register" which shall be in the form contained in the Schedule annexed hereto and such register shall be signed by the parties to the marriage, the witnesses and the Registrar.

18. Custody of Certificates, etc. (1) The Registrar shall deliver one of the certificates to the husband, another to the wife, or, if either of them is under 20 years of age, to his or her parent or guardian, forward the third to the Deputy Commissioner in accordance with sub-section (2), and retain the fourth.

(2) The Registrar shall forward the notice under section 6, one marriage certificate and all other documents relating to the marriage through the Township Officer to the Deputy Commissioner or his District within a week of the marriage, and the said documents shall be filed in the

the register of marriages and kept in the Office of the Deputy Commissioner permanently.

19. Marriage Register and other documents to be open to inspection. The register of marriages and other documents appertaining thereto shall at all reasonable times be open to inspection and certified copies thereof shall, on application, be supplied by the Deputy Commissioner on payment to him by the applicant of a fee at the rate fixed by the Governor.

20. Evidence of Marriage. Certified copies of documents relating to marriages under this Act shall be received in evidence without further proof.

21. Information regarding cohabitation. (1) A Buddhist woman or her parent, guardian, brother or sister may give information to a Registrar within whose jurisdiction she resides that she has been cohabiting with a non-Buddhist without being legally married to him. The Registrar shall record the information or cause it to be recorded and all the information so recorded shall be signed by the informant.

(2) Registrar to summon parties and explain provisions of Act. The Registrar shall then summon both the Buddhist woman and the non-Buddhist man to appear before him on a date fixed by him and on their appearance explain to them the provisions of this Act relating to marriage and if both the parties wish to contract a marriage the Registrar shall proceed as prescribed in sections 6, 7, 8, 9 and 10. If either party is unwilling to contract a marriage, the

the Registrar shall explain to the willing party that the marriage cannot be solemnized as both the parties do not agree to the proposed marriage but that the willing party may file a suit in a Civil Court for damages for breach of promise of marriage or seduction or both as the case may be.

22. Presumption regarding promise of marriage. (1) In the absence of any agreement in writing to the contrary a promise of a non-Buddhist to marry a Buddhist woman shall be deemed to be a promise to marry her under this Act.

(2) Such a promise shall be presumed juris et de jure if the parties have lived together under such circumstances that they would have been husband and wife according to Burmese Buddhist Law if both of them had been Burmese Buddhists.

23. Effect of marriage of member of undivided family. The marriage under this Act of any member of an undivided family who professes the Hindu, Sikh, or Jaina religion shall be deemed to effect his severance from such family and in case of his death before partition, his vested right shall devolve on his wife and children.

24. Ownership of properties. All questions relating to the ownership of properties of the parties to the marriage contracted under this Act shall be decided according to the Burmese Buddhist Law as if the parties were Burmese Buddhists.

25. Law of Divorce. The Burmese Buddhist Law of Divorce shall apply to marriages contracted under this Act as if the

the parties were Burmese Buddhists.

26. Law of Succession and Inheritance. The Burmese Buddhist Law of Succession and Inheritance shall apply to properties of the parties who marry under this Act as if they were Burmese Buddhists.

27. Legitimacy of children. If a marriage is solemnized under this Act, any child born of the couple before the marriage shall be deemed legitimate.

28. Penalty for false declaration or certificate. Any person making, signing or attesting any declaration or certificate prescribed by this Act containing a statement which is false and which he either knows or believes to be false or does not believe to be true shall be deemed to have committed an offence under section 199 of the Penal Code.

29. Penalty for wrongful actions of Registrar. Any Registrar who knowing and wilfully solemnizes a marriage underthis Act -

(i) without publishing the notice regarding such marriage as required by section 9, or

(ii) within 14 days after receipt by him of notice of such marriage, or

(iii) when one of the parties to the marriage is under 20 years of age, without the required consent of the parent or guardian of such party having been obtained, or

(iv) in contravention of the provisions of sub-section (1) of section 12 or os sub-section (3) or

or sub-section (6) of section 13,

shall be punished with imprisonment for a term which may extend to one year and shall also be liable to a fine not exceeding rupees five hundred.

30. Rules. The Governor may make rules for the disposal of the fees mentioned in section 8, the supply of registers, forms, certified copies and the preparation and submission of returns of marriages solemnized under this Act.

.....

APPENDIX VII.

၁၉၅၄ ခုနှစ်၊ ဗုဒ္ဓဘာသာဝင် မိန်းမများ အထူးထိမ်းမြားမှုနှင့် အမွေဆက်ခံမှုအက်ဥပဒေ။

(Reprint—1957)

[၁၉၅၄ ခုနှစ်၊ အက်ဥပဒေ အမှတ် ၃၂။]

အောက်ပါအတိုင်း အက်ဥပဒေအဖြစ် ပြဋ္ဌာန်းလိုက်သည်။

၁။ ။ဤအက်ဥပဒေကို ၁၉၅၄ ခုနှစ်၊ ဗုဒ္ဓဘာသာဝင်မိန်းမများအထူးထိမ်းမြားမှုနှင့် အမွေဆက်ခံမှုအက်ဥပဒေဟုခေါ်ရမည်။

၂။ ။ဤအက်ဥပဒေတွင် အကြောင်းအရာနှင့်ဖြစ်စေ၊ ရှေ့နောက်စကားတို့၏အဓိပ္ပါယ်နှင့်ဖြစ်စေ မဆန့်ကျင်လျှင်—

(က) "ဗုဒ္ဓဘာသာဝင်မိန်းမ" ဆိုသည်မှာပြည်ထောင်စုမြန်မာနိုင်ငံသားဖြစ်သည့်ပြင်၊ဗုဒ္ဓဘာသာ ကိုးကွယ်သောမိန်းမကို၊သို့တည်းမဟုတ် ဗုဒ္ဓဘာသာကိုးကွယ်သော မိဘတို့မှမွေးဖွါးသောမိန်းမကို ဆိုလိုသည်။

<u>ခြွင်းချက်။</u> ။သို့ရာတွင် ဗုဒ္ဓဘာသာကိုးကွယ်သော မိဘတို့မှမွေးဖွါးသောမိန်းမတဦးသည်၊ ဤအက်ဥပဒေစတင် အာဏာမတည်မီက အခြားဘာသာတခုခုသို့ အထင်အရှားကူးပြောင်း၍၊ ထိုအခြားဘာသာကိုကိုးကွယ်လျက်ရှိလျှင်၊ ထိုမိန်းမသည်ဗုဒ္ဓဘာသာကိုးကွယ်သော မိဘတို့မှမွေးဖွါးသည်ဟူသော အကြောင်းသက်သက်ကြောင့်ဗုဒ္ဓဘာသာဝင်မိန်းမဖြစ်သည်ဟု မမှတ်ယူရ။

(ခ) "မှတ်ပုံတင်အရာရှိ" ဆိုသည်မှာ၊ ဤအက်ဥပဒေအရထိမ်းမြားမှုမှတ်ပုံတင်အရာရှိကိုဆိုလိုသည်။

၃။ ။(၁) ရွာသူကြီးအားလုံးသည်၊ ဤအက်ဥပဒေအရထိမ်းမြားမှု မှတ်ပုံတင်အရာရှိများဖြစ်ရမည်။ နိုင်ငံတော်သမတသည် မိမိသင့်တော်သည် ထင်မြင်သောပုဂ္ဂိုလ်ကို ရွာသူကြီးမရှိသည့်ဒေသအတွက် ထိမ်းမြားမှုမှတ်ပုံတင်အရာရှိအဖြစ်ခန့်ထားနိုင်သည်။ မှတ်ပုံတင်အရာရှိများအား အကြောင်းကြားစာပုံစံများနှင့် ထိမ်းမြားမှုသက်သေခံမှတ်ပုံစာအုပ်များကို ပေးအပ်ထားရမည်။

(၂) မှတ်ပုံတင်အရာရှိ အားလုံးသည် ပြည်သူ့ဝန်ထမ်းများဖြစ်သည်ဟုမှတ်ယူရမည်။

၄။ ။အခြားတည်ဆဲ တရားဥပဒေများတွင်သော်ငင်း၊ တရားဥပဒေကဲ့သို့ အာဏာရှိသော လေ့ထုံးစံများတွင်သော်ငင်း၊ မည်သို့ပင်ဆန့်ကျင်လျက်ပါရှိစေကာမူ၊ ဤအက်ဥပဒေပါပြဋ္ဌာန်းချက်များသည်၊ ဗုဒ္ဓဘာသာဝင်မိန်းမနှင့်ထိမ်းမှု၊ ဗုဒ္ဓဘာသာဝင်မဟုတ်သော လင်ယောကျ်ားတိုင်းအပေါ်၌ အာဏာသက်ရောက်ရမည်။

၂

၅။ ။လူမျိုဘော်ဝင်ပြီးဖြစ်သည့် ဗုဒ္ဓဘာသာဝင်မဟုတ်သော ယောကျ်ားတဦးနှင့် အသက် ၁၄ နှစ်အောက်မငယ်သည့် ဗုဒ္ဓဘာသာဝင်မိန်းမတဦးတို့သည်၊ ၎င်း အက်ဥပဒေအရထိမ်းမြားနိုင်သည်၊ သို့ရာတွင်—

(က) နှစ်ဦးလုံးမှာ စိတ်ပေါ့သွပ်သူများမဖြစ်စေရ၊

(ခ) အသက် ၂၀ မပြည့်သေးသည့်မိန်းမဖြစ်လျှင်မိဘ၏သဘောတူချက်ကိုသော်၎င်း၊ မိဘတို့သေဆုံးပါမူ၊ အမှန်အုပ်ထိန်းသူ၊ သို့တည်းမဟုတ် တရားဥပဒေအရအုပ်ထိန်းသူရှိလျှင်၊ ထိုအုပ်ထိန်းသူ၏ သဘောတူချက်ကိုသော်၎င်း ရရှိပြီးဖြစ်ရမည်။

(ဂ) မိန်းမမှာ မပြတ်စဲသော တရားဝင်လင်ယောကျ်ားမရှိစေရ။

၆။ ။ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့် ယောကျ်ားတဦးနှင့် ဗုဒ္ဓဘာသာဝင်မိန်းမ တဦးထိမ်းမြားရန်ကြိုရွယ်သည်အခါ၊ မိမိတို့တဦးဦး ၁၄ ရယ်ထက်မနည်းနေထိုင်လျက်ရှိသည့် ဒေသဆိုင်ရာမှတ်ပုံတင်အရာရှိထံ ဇယားတွင်ပြဋ္ဌာန်းထားသည့်ပုံစံဖြင့်၊ မိမိတို့ တဦးဦးကအကြောင်းကြားစာပေးပို့နိုင်သည်။ အကြောင်းကြားစာပုံစံကို မှတ်ပုံတင်အရာရှိထံတောင်းယူလျှင်ရနိုင်သည်။

၇။ ။ပုဒ်မ ၆ အရ အကြောင်းကြားစာခပေးသူသည်၊ အကြောင်းကြားစာတွင် ပြဋ္ဌာန်းထားသည့်ထုတ်ဖော်ချက်ကို သက်သေနှစ်ဦးနှင့် ထိမ်းမြားပေးရမည့် မှတ်ပုံတင် အရာရှိတို့ရှေ့တွင် လက်မှတ်ထိုးရမည်။

၈။ ။(၁) မှတ်ပုံတင်အရာရှိသည်—

(က) အကြောင်းကြားစာမိတ္တူတစောင်ကို၊ မိမိ၏ရုံးရှိအမျှားမြင်သာသည့်နေရာ၌ကပ်ခြင်းဖြင့်၎င်း၊

(ခ) အကြောင်းကြားစာမိတ္တူတစောင်ကို၊ တရားမကျင့်ထုံးဥပဒေအရသမ္မာန်စာများ၊ သို့တည်းမဟုတ်နို့တစ်စာများပေးသည့်နည်းလမ်းအတိုင်း၊

(ကက) ထိမ်းမြားမည့်မိန်းမအသက် ၂၀ မပြည့်သေးလျှင် ထိုမိန်းမ၏မိဘ၊ သို့တည်းမဟုတ်အုပ်ထိန်းသူဆိုင်သင့်ရာရာအားပေးခြင်းဖြင့်၎င်း၊

(ခခ) မိန်းမသည်၊ ယောကျ်ားတဦးနှင့် ထိမ်းမြားဘူးလျှင်၊ ထိုယောကျ်ားအား ပေးခြင်းဖြင့်၎င်း

အကြောင်းကြားစာကိုကျေညာစေရမည်။

ခြွင်းချက်။ ။သို့ရာတွင် အကြောင်းကြားစာ မိတ္တူပေးခြင်းခံရမည့်သူတဦးတယောက်၏နေရပ်သည်၊ မှတ်ပုံတင်အရာရှိ၏ စီရင်ပိုင်ခွင့်အာဏာနယ်နိမိတ်ပြင်ပတွင်ရှိလျှင်၊ မှတ်ပုံတင်အရာရှိသည် မိတ္တူတစောင်ကို ထိုသူထံစာပို့တိုက်မှ ရိုးရှင်းကြိုးပြုလုပ်၍ဖြစ်စေ၊ လူလွှတ်၍ဖြစ်စေ ပေးပို့နိုင်သည်။

(၂) မှတ်ပုံတင် အရာရှိသည် ပြဋ္ဌာန်းထားသည့်ပုံစံပါ မူလအကြောင်းကြားစာအောက်ခြေရှိ သက်သေခံလက်မှတ်တွင် ဆိုင်ရာအကြောင်းအရာများကိုရေးသွင်းရမည်။

၉။ ။ထိမ်းမြားရန်ကြိုးစားသည့်အကြောင်းကြားစာကို ပုဒ်မ ၆ အရပေး ပြီးနောက် ၁၄ ရက်ကြာသည့်အခါ၊ ဤအက်ဥပဒေတွင်နောက်ဆက်တွဲပါရှိသည့်နည်း လမ်းအတိုင်း ကြိုတင်ကန့်ကွက်ခြင်းမရှိလျှင် မှတ်ပုံတင်အရာရှိက သက်ဆိုင်သူနှစ်ဦးကို ထိမ်းမြားပေးနိုင်သည်။

၁၀။ ။အကြောင်းကြားစာ ပေးထားသူတို့ထိမ်းမြားလျှင်၊ ပုဒ်မ ၅ တွင် ပြဋ္ဌာန်းထားသည့် စည်းကမ်းတရပ်နှင့်ဖြစ်စေ၊ အများနှင့်ဖြစ်စေ၊ ဆန့်ကျင်မည်ဟူသော အကြောင်းပြချက်ဖြင့် မည်သူမဆို မှတ်ပုံတင်အရာရှိထံလိပ်တင်လွှာက် တိုသူတို့အား ထိမ်းမြားခြင်းမပြုစေရန် စာရေးသားကန့်ကွက်နိုင်သည်။

၁၁။ ။(၁)ကန့်ကွက်လွှာရှိသောအခါမှတ်ပုံတင်အရာရှိသည်၊ကန့်ကွက် သူအားစိစစ်ပိုင်ခွင့်အာဏာရတရားရုံးသို့ညွှန်ရမည်ပြင် ထိမ်းမြားခြင်းကိုလည်းထိုအခါ၌ ထိုတရားရုံးဖွင့်လှစ်လျက်ရှိလျှင်၊ ၁၄ ရက်မှမရှေ့ဆိုင်းထားရမည်။ ဖွင့်လှစ်လျက်မရှိလျှင် ထိုတရားရုံးဖွင့်လှစ်သည့်နေ့မှ ၁၄ ရက်မှမရှေ့ဆိုင်းထားရမည်။သို့ရာတွင်မှတ်ပုံတင်အရာ ရှိသည့် ကန့်ကွက်သူကလျှောက်ထားသည့်အခါ လုံလောက်သောအကြောင်းတရင်ဆိုင် ရှိသည်ဟုထင်မြင်လျှင် ထိုသို့ထိမ်းမြားခြင်းကို နောက်ထပ် ၁၄ ရက်ထက်မပိုသော ကာလမျှ ထပ်မံရွှေ့ဆိုင်းနိုင်သည်။

(၂) ပုဒ်မခွဲ(၁)အရ စိစစ်ပိုင်ခွင့်အာဏာရတရားရုံးသည်၊မှတ်ပုံ တင်အရာရှိ၏ရုံးတည်ရှိရာဒေသတွင်စိစစ်ပိုင်ခွင့်ရှိသည့် မြို့နယ်တရားမတရားရုံး၊သို့တည်း မဟုတ် ရန်ကုန်မြို့တော်တရားမရုံး ဖြစ်စေရမည်။

၁၂။ ။(၁)အကြောင်းကြားစားပေးထားသူတို့၌၊ပုဒ်မ ၅ အရ၊ ထိမ်းမြား နိုင်ခွင့်ရှိမရှိအမှန်ချမှတ်ရန်၊ စိစစ်ပိုင်ခွင့်အာဏာရတရားရုံးသို့ကန့်ကွက်သူက လျှောက် လွှာတင်သွင်းနိုင်သည်။

(၂) တရားရုံးကထိုလျှောက်လွှာရရှိကြောင်းသက်သေခံလက်မှတ် တစောင်ကို လျှောက်ထားသူအား ပေးရမည်။

(၃) (က) တရားရုံးကပေးသည့် သက်သေခံလက်မှတ်ကိုမှတ်ပုံ တင်အရာရှိထံ ပုဒ်မ ၁၁၊ ပုဒ်မခွဲ(၁)အရ၊ ထိုအရာရှိခွင့်ပြုထားသည့် အချိန်ကာလ အတွင်းတင်သွင်းလျှင်၊အကြောင်းကြားစာပေးထားသူတို့နှင့်ပုဒ်မ ၅ အရ၊ထိမ်းမြားနိုင်ခွင့် ရှိသည်ဟူသော အမှန်ကို တရားရုံးမှ မရသမျှကာလပတ်လုံးထိုသူတို့ကိုထိမ်းမြားမပေးရ။

(ခ) ထိုသက်သေခံလက်မှတ်ကို မှတ်ပုံတင်အရာရှိထံ ထို အရာရှိခွင့်ပြုထားသည့်အချိန်ကာလအတွင်း မတင်သွင်းလျှင်၊ မှတ်ပုံတင်အရာရှိသည် သက်ဆိုင်သူနှစ်ဦးကထိမ်းမြားလိုမူ ထိမ်းမြားပေးရမည်။

(၄) တရားရုံးသည် လျှောက်လွှာတွင်ပါရှိသည့် အချက်များကို ၎င်း၊နှစ်ဘက်အမှုသည်များတင်ပြသည့် သက်သေခံချက်ကိုဝင်း၊အကျဉ်းချုပ်နည်းဖြင့်စစ် ဆေးကြားနာပြီးနောက်၊ထိုသူနှစ်ဦးတွင် ပုဒ်မ ၅ အရ ထိမ်းမြားနိုင်ခွင့် ရှိမရှိဆုံးဖြတ်ရမည့် ပြင် ထိုသို့ဆုံးဖြတ်သည့်အတိုင်းလည်း အမှန်ချမှတ်ရမည်။ ထိုအမှန်သည် အပြီးသတ်ဖြစ် ရမည်။

(၅) တရားရုံးသည်၊ မိဒိချမှတ်သော အမှန်၏ မိတ္တူတစောင်ကို မှတ်ပုံတင်အရာရှိထံ ချက်ခြင်းပို့ရမည်။

(၆) (က) ထိုသူနှစ်ဦးနှစ်ပုဒ်မ ၅ အရ၊ထိန်းမြားနိုင်ခွင့်ရှိသည်ဟုတရား ရုံးက အမိန့်ချမှတ်လျှင်၊ မှတ်ပုံတင်အရာရှိသည် ထိုသူတို့က ထိန်းမြားလိုမူထိန်းမြား ပေးရမည်။

(ခ) ထိုသူနှင်ဦးနှစ် ပုဒ်မ ၅ အရ၊ ထိန်းမြားနိုင်ခွင့်မရှိဟု တရားရုံးက အမိန့်ချမှတ်လျှင်၊မှတ်ပုံတင်အရာရှိသည် ထိန်းမြားမပေးရ။

၁၃။ ၊ကန့်ကွက်ခြင်းသည် မသင့်လျော်သည့်အပြင်၊ သဘောရိုးနှင့်ကန့် ကွက်ခြင်းလည်းမဟုတ်ဟု ပုဒ်မ ၁၂ အရ၊ လျောက်လွှာတင်သွင်းရာ တရားရုံးက ထင်မြင်လျှင် ၅၀၀ ထက်မပိုသည့်လျော်ကြေးငွေကို လျောက်ထားသူက ထိန်းမြားမည့် သူနှစ်ဦးအား ပေးစေရန် စီရင်နိုင်သည်။

၁၄။ ။ဤအက်ဥပဒေအရ၊ ထိန်းမြားခြင်းကို သဘောတူချက် ပေးရမည့် သူသည် စိတ်ပေါ့သွပ်နေလျှင်၊ သို့တည်းမဟုတ် ထိုသို့သဘောတူချက် ပေးရမည့်သူ (မိဘမှတပါး) သည် လုံလောက်သောအကြောင်းမရှိဘဲ ထိန်းမြားခြင်းကို သဘောတူ ချက်မပေးလျှင် ထိန်းမြားလိုသူတို့သည် စီရင်ပိုင်ခွင့်အာဏာရတရားရုံးသို့ လျောက်လွှာ ဖြင့် လျောက်ထားနိုင်သည်။

ထိုတရားရုံးသည်လျောက်လွှာပါအချက်များကို အကျဉ်းချုပ်နည်းဖြင့် စစ်ဆေး နိုင်သည်။

ထို့ပြင် စစ်ဆေးသောအခါ၊ ထိုသူတို့၌ ပုဒ်မ ၅ အရ၊ ထိန်းမြားနိုင်ခွင့်ရှိသည် ဟုထင်မြင်လျှင်၊ ထိန်းမြားနိုင်ကြောင်းကို တရားရုံးကကျေညာရမည်။

ထိုကျေညာချက်သည် သဘောတူချက်ပေးရမည့်သူက သဘောတူချက်ပေးပြီး ဖြစ်ဘိယကဲ့သို့ အကျိုးသက်ရောက်ရမည်။

၁၅။ ။ပုဒ်မ ၉၊ ၁၂၊ ၁၄ တခုခုအရ၊ ထိန်းမြားသောအခါ၊ မှတ်ပုံတင် အရာရှိသည် သက်သေနှစ်ဦးရှေ့တွင် သက်ဆိုင်သူတို့ကိုထိန်းမြားပေးရမည်။ ထိုသက် သေတို့သည် ပုဒ်မ ၆ တွင်ရည်ညွှန်းထားသည့်ထိန်းမြားမှု သက်သေခံမှတ်ပုံစာအုပ်တွင် အသိသက်သေအဖြစ် လက်မှတ်ထိုးရမည်။ ထိန်းမြားခြင်းကို မည်သည့်နည်းဖြင့်မဆို ဆောင်ရွက်နိုင်သည်။ သို့ရာတွင် ထိန်းမြားမည့်သူမှာသည် မှတ်ပုံတင်အရာရှိနှင့် သက်သေများရှေ့တွင်၊ ထိုသူတို့ကြားလောက်အောင် " ကျွန်ုပ်တို့သည် တရားဝင် လင်မယားအဖြစ် ပေါင်းဖက်ပါမည် " ဟူ၍ပြောဆိုရမည်။

၁၆။ ။အထက်ပါအတိုင်း ထိန်းမြားပြီးသည့်အခါ မှတ်ပုံတင်အရာရှိသည် သက်ဆိုင်သောအကြောင်းအရာများကို " ထိန်းမြားမှုသက်သေခံမှတ်ပုံစာအုပ် " ဟု ခေါ်တွင်သည့်မှတ်ပုံစာအုပ်၌၊ မူရင်းထပ်တူလေးစောင်ရေးသွင်းရမည်။ ထိုမှတ်ပုံစာအုပ် သည် ဤအက်ဥပဒေတွင်ပူးတွဲထားသည့် ဇယားပါပုံစံအတိုင်းဖြစ်စေရမည့်ပြင်၊ထိုမှတ်ပုံ စာအုပ်တွင် ထိန်းမြားသူတို့ကဝင်း၊ သက်သေတို့ကဝင်း၊ မှတ်ပုံတင်အရာရှိကဝင်း လက်မှတ်ကိုးရမည်။

၁၇။ ။(၁) မှတ်ပုံတင်အရာရှိသည်၊ သက်သေခံလက်မှတ် တစောင်ကို လင်အား၊ အခြားတစောင်ကိုမယားအား ပေးအပ်ရမည်။ အကယ်၍မယားသည် အသက် ၂၀ မပြည့်သေးလျှင် သူ၏မိဘအား၊ သို့တည်းမဟုတ် အုပ်ထိန်းသူအား

ပေးအပ်ရမည်။ တတိယတစောင်ကို ပုဒ်မခွဲ (၂) နှင့်အညီခရိုင်ဝန်ထံပို့၍ စတုတ္ထတစောင်ကိုသိမ်းထားရမည်။

(၂) မှတ်ပုံတင်အရာရှိသည်၊ ပုဒ်မ ၆ အရ၊ အကြောင်းကြားစာရရှိလျှင်၊ ထိုအကြောင်းကြားစာကိုဂုဏ်း၊ ထိမ်းမြားမှုသက်သေခံလက်မှတ်တစောင်ကိုဂုဏ်း၊ ထိမ်းမြားခြင်းဆိုင်ရာအခြားစာတမ်းအမှတ် အသားအရုပ်ရပ်ကိုဂုဏ်း၊ ထိမ်းမြားသည့်နေ့မှ ရက်သတ္တတပတ်အတွင်း ဆိုင်ရာခရိုင်ဝန်ထံသို့ မြို့နယ်အရာရှိမှတဆင့်ပို့ရမည်။ ထိုပြင် ဆိုခဲ့သည့်စာတမ်းအမှတ်အသားများကို ထိမ်းမြားမှုဆိုင်ရာ မှတ်ပုံစာအုပ်တွင် တွဲထားရမည့်ပြင်၊ ခရိုင်ဝန်ရုံးတွင် အမြဲသိမ်းထားရမည်။

၁၈။ ။ထိမ်းမြားမှု သက်သေခံမှတ်ပုံစာအုပ်နှင့် ထိမ်းမြားခြင်းဆိုင်ရာအခြားစာတမ်း အမှတ်အသားများကိုသင့်တော်သည့်အခါများ၌ ကြည့်ရှုခွင့်ပြုရမည့်ပြင်၊ ထိုစာတမ်းအမှတ်အသားများ၏ တာဝန်ခံမိတ္တူများကို ရလိုကြောင်းလျှောက်ထားသည့်အခါ၊ ခရိုင်ဝန်သည် နိုင်ငံတော်သမတ သတ်မှတ်ထားသည့်နှုန်းအတိုင်း အခကြေးကို မိမိအားလျှောက်ထားသူကပေးဆောင်လျှင် ထုတ်ပေးရမည်။

၁၉။ ။၅၏အက်ဥပဒေအရ၊ ထိမ်းမြားခြင်းနှင့်ဆိုင်သည့် စာတမ်းအမှတ်အသားများ၏တာဝန်ခံမိတ္တူများတွင်ပါရှိသည့်အကြောင်းအရာများသည် မှန်သည်ဟု သက်သေခံအဖြစ် လက်ခံရမည်။ နောက်ထပ်သက်သေထင်ရှားပြရန်မလို။

၂၀။ ။(၁) ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့်ယောကျ်ားတဦးနှင့် ဗုဒ္ဓဘာသာဝင်မိန်းမတဦးတို့ပေါင်းဖက်နေထိုင်ပြုမူကြပုံလည် အကယ်၍ထိုသူနှစ်ဦးလုံး ဗုဒ္ဓဘာသာဝင်မြန်မာလူမျိုးဖြစ်ခဲ့သော်၊ ဗုဒ္ဓဘာသာမမွေသတ်အရ၊ လင်မယားအရာမြောက်မည့်ပေါင်းဖက်နေထိုင် ပြုမူကြပုံမျိုးဖြစ်လျှင်၊ ထိုသူတို့သည် ထိုသို့ပေါင်းဖက်စကပင် ထိမ်းမြားခဲ့ကြသည်ဟုမှတ်ယူရမည့်ပြင်၊ ထိုသူတို့သည် ၅၏အက်ဥပဒေအရ၊ ထိမ်းမြားခဲ့ကြသည်ဟုလည်း မှတ်ယူရမည်။

(၂) ထိုလင်မယားသည် စတင်ပေါင်းဖက်သည့်နေ့မှစ၍ မည်သည့်အခါတွင်မဆို၊ ၅၏အက်ဥပဒေအရ မှတ်ပုံတင်ရန် မှတ်ပုံတင်အရာရှိထံ လျှောက်ထားနိုင်သည်။ ထိုအခါမှတ်ပုံတင်အရာရှိသည် ပုဒ်မ ၁၅ အရ လိုအပ်သည့်အတိုင်း၊ ထိုသူတို့ကို မိမိကထိမ်းမြားပေးတိုသကဲ့သို့ ပုဒ်မ ၁၆ နှင့် ၁၇ တွင်သတ်မှတ်ထားသည့်အတိုင်းဆောင်ရွက်ရမည်။

(၃) ၅၏ပုဒ်မပါပြဋ္ဌာန်းချက်များသည်၊ ပုဒ်မခွဲ (၃) ၌ဖော်ပြထားသည့်ပေါင်းဖက်နေထိုင်ပြုမူကြပုံမျိုးဖြင့်၊ ၅၏အက်ဥပဒေစတင်အာဏာတည်မီကြောက်လကာလအပိုင်းအခြားအတွင်း မည်သည့်အခါတွင်မဆို၊ ပေါင်းဖက်လျက်ရှိသည့် ဗုဒ္ဓဘာသာဝင်မိန်းမနှင့် ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့်ယောကျ်ားတိုင်းအပေါ်၌ အာဏာသက်ရောက်ရမည်။

၂၁။ ။(၁) ဗုဒ္ဓဘာသာဝင် မိန်းမတဦးနှင့် ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့်ယောကျ်ားတဦးတို့သည် မိမိတို့၏ထိမ်းမြားခြင်းကို မှတ်ပုံမတင်ဘဲ ပေါင်းဖက်လျက်ရှိလျှင်၊ ထိုအကြောင်းကို၊ ထိုမိန်းမ နေထိုင်ရာဒေသတွင် စီရင်ပိုင်ခွင့်အာဏာရှိသည့် မှတ်ပုံတင်အရာရှိထံ၊ ထိုမိန်းမကဖြစ်စေ၊ ထိုမိန်းမ၏အမိက၊ သို့တည်းမဟုတ်အဘက၊ သို့တည်းမဟုတ် အုပ်ထိန်းသူကဖြစ်စေ၊ အခြား ဆွေမျိုးတော်စပ်သူ တဦးဦးကဖြစ်စေ၊

သတင်းပေးနိုင်သည်။ မှတ်ပုံတင်အရာရှိသည်၊ သတင်းပေးချက်ကိုရေးမှတ်ထားရမည်။ သို့တည်းမဟုတ်ရေးမှတ်ထားစေရမည်။ ထို့ပြင် ထိုသို့ရေးမှတ်ထားသည့် သတင်းပေးချက်အားလုံးကို သတင်းပေးသူကလက်မှတ်ထိုးရမည်။

(၂) ထိုနောက်မှတ်ပုံတင်အရာရှိသည်၊ ထိုဗုဒ္ဓဘာသာဝင် မိန်းမနှင့်ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့်ယောကျ်ားတို့ကို မိမိချိန်းဆိုသည့်နေ့ရက်တွင် မိမိထံလာရောက်ရန်ဆင့်ခေါ်ရမည်။ ထိုသူနှစ်ဦးလုံးက မိမိတို့၏ထိမ်းမြားခြင်းကို မှတ်ပုံတင်လိုလျှင်၊ မှတ်ပုံတင်အရာရှိသည်၊ ပုဒ်မ ၁၅ အရ၊ လိုအပ်သည့်အတိုင်း ထိုသူတို့ကို မိမိကထိမ်းမြားပေးဘိသကဲ့သို့၊ ပုဒ်မ ၁၆ နှင့် ၁၇ တွင်သတ်မှတ်ထားသည့်အတိုင်း ဆောင်ရွက်ရမည်။ အကယ်၍တဦးဦးကဖြစ်စေ၊ နှစ်ဦးလုံးကဖြစ်စေ၊ မိမိတို့၏ထိမ်းမြားခြင်းကိုမှတ်ပုံမတင်လိုလျှင်၊ သို့တည်းမဟုတ် မလာရောက်လျှင်၊ မှတ်ပုံတင်အရာရှိသည်၊ ပုဒ်မ ၁၁ တွင်ရည်ညွှန်းထားသည့်ငြင်းပိုင်ခွင့်အာဏာရတရားရုံးသို့ ရေးမှတ်ထားသည့် သတင်းပေးချက်နှင့်တကွအစီရင်ခံစာပေးပို့ရမည်။

(၃) အခြားတည်ဆဲတရားဥပဒေများတွင် မည်သို့ပင်ပါရှိစေကာမူ၊ ထိုတရားရုံးသည်၊ အစီရင်ခံစာရရှိသောအခါ၊ ထိုအမှုသည်နည်းလမ်းတကျစွဲဆိုသည့် တရားမမူဖြစ်ဘိသကဲ့သို့ပုဒ်မခွဲ (၄) တွင်ဖေါ်ပြထားသည့်နှစ်ဘက်အမှုသည်များကိုငင်း၊ ထိုသူတို့တင်ပြသည့်သက်သေခံချက်ကိုငင်း၊ အကျဉ်းချုပ်နည်းအားဖြင့်စစ်ဆေးကြားနာပြီးနောက်၊ ထိုမိန်းမနှင့်ထိုယောကျ်ားတို့သည်၊ ပုဒ်မ ၂၀၊ ပုဒ်မခွဲ (၁) ၏အဓိပ္ပါယ်အရ၊ လင်မယားဟုတ် မဟုတ်ဆုံးဖြတ်ရမည်ဖြစ်ပြီး၊ ဆုံးဖြတ်သည့်အတိုင်း အမိန့်ချမှတ်ရမည်။ တရားရုံးသည် စရိတ်နှင့်စပ်လျဉ်း၍ မိမိသင့်တော်သည်ထင်မြင်သည့်အမိန့်ကို ချမှတ်နိုင်သည်။

(၄) (က) တဦးဦးက ထိမ်းမြားခြင်းကိုမှတ်ပုံမတင်လိုသည့်အမှုတွင် မှတ်ပုံတင်လိုသူအား တရားလိုဟူ၍ငင်း၊ မှတ်ပုံမတင်လိုသူအား တရားခံဟူ၍ငင်းမှတ်ယူရမည်။

(ခ) နှစ်ဦးလုံးက ထိမ်းမြားခြင်းကို မှတ်ပုံမတင်လိုသည့်အမှုတွင်ဆိုင်ရာသတင်းပေးသူအား တရားလိုဟူ၍ငင်း၊ မှတ်ပုံမတင်လိုသူနှစ်ဦးအား တရားခံဟူ၍ငင်း မှတ်ယူရမည်။

(၅) တရားရုံးသည်၊ မိမိချမှတ်သောအမိန့်၏ မိတ္တူတစောင်ကို မှတ်ပုံတင်အရာရှိထံသို့ ချက်ခြင်းပေးပို့ရမည်။

(၆) တရားရုံးက ထိုယောကျ်ားနှင့်မိန်းမတို့သည် ပုဒ်မ ၂၀၊ ပုဒ်မခွဲ (၁) ၏အဓိပ္ပါယ်အရ၊ လင်မယားဖြစ်သည်ဟုဆုံးဖြတ်လျှင် မှတ်ပုံတင်အရာရှိသည်၊ ထိုတရားရုံး၏အမိန့်အတိုင်း ထိမ်းမြားမှုသက်သေခံမှတ်ပုံစာအုပ်တွင် လိုအပ်သည့်ပြင်ဆင်ချက်များပြုရ၍၊ ထိုမှတ်ပုံစာအုပ်တွင် သက်ဆိုင်သည့်အကြောင်းအရာများကို မူရင်းထပ်တူလေးစောင်ရေးသွင်းရမည်။ ထို့ပြင် မှတ်ပုံတင်အရာရှိသည်၊ ထိုမှတ်ပုံစာအုပ်တွင် လက်မှတ်ထိုးပြီးနောက် ပုဒ်မ ၁၇ တွင်သတ်မှတ်ထားသည့်အတိုင်းဆောင်ရွက်ရမည်။

(၇) မြို့နယ်တရားမတရားရုံးမှချမှတ်သောအမိန့်ကို၊ ထိုရုံးတည်ရှိရာဒေသတွင် စီရင်ပိုင်ခွင့်ရှိသည့်ခရိုင်တရားမရုံးဦအယူခံဝင်ခွင့်ရှိစေရမည်။ ရန်ကုန်မြို့တော်တရားမရုံးမှချမှတ်သောအမိန့်ကို၊ တရားလွှတ်တော်ဦအယူခံဝင်ခွင့်ရှိစေရမည်။ အယူခံမှုတွင် ခရိုင်တရားမရုံးက၊ သို့တည်းမဟုတ် တရားလွှတ်တော်က ချမှတ်သောအမိန့်သည် အပြီးသတ်ဖြစ်ရမည်။

၂၂။ ။ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့်ယောကျ်ားက၊ ဗုဒ္ဓဘာသာဝင်မိန်းမကို ထိမ်းမြားရန်ကတိပြုလျှင်၊ ထိုယောကျ်ားသည် ထိုမိန်းမကို ဤအက်ဥပဒေအရ ထိမ်းမြားရန် ကတိပြုသည်ဟုမှတ်ယူရမည်။

၂၃။ ။ဟိန္ဒူဘာသာ၊ ဆိ(ခ်)ဘာသာ၊ ဂျိန်းဘာသာတရပ်ရပ်ကိုကိုးကွယ်သော ပစ္စည်းမဲ့ဝေရသေးသည့် အိမ်ထောင်သားစုဝင်တဦးတယောက်သည်၊ ဗုဒ္ဓဘာသာဝင်မိန်းမနှင့်ဤအက်ဥပဒေအရ ထိမ်းမြားလျှင်၊ သို့တည်းမဟုတ် ထိမ်းမြားခဲ့သည်ဟု မှတ်ယူခြင်းခံရလျှင်၊ ထိုသူသည် ထိုအိမ်ထောင်သားစုမှခွဲခွာပြီဟု မှတ်ယူရမည်။ ထို့ပြင် ပစ္စည်းခွဲဝေခြင်းမပြုမီ၊ ထိုသူသေဆုံးလျှင်၊ ထိုသူပိုင်သည့်ဆိုင်ရာဆိုင်ခွင့်သည်၊ ထိုသူ၏မယားနှင့်သားသမီးများသို့သက်ရောက်ရမည်။

၂၄။ ။(၁) ဤအက်ဥပဒေအရ ထိမ်းမြားသူတို့၏၊ သို့တည်းမဟုတ် ထိမ်းမြားခဲ့သည်ဟု မှတ်ယူခြင်းခံရသူတို့၏ ပစ္စည်းပိုင်ဆိုင်ခွင့်နှင့် စပ်လျဉ်းသောကိစ္စအားလုံးကို၊ ထိုသူတို့နှင့်ထိုသူတို့၏မိသားစုအားလုံးသည် ဗုဒ္ဓဘာသာဝင်မြန်မာလူမျိုးချည်းဖြစ်ဘိသကဲ့သို့၊ ဗုဒ္ဓဘာသာဓမ္မသတ်အတိုင်းဆုံးဖြတ်ရမည်။

(၂) ဤပုဒ်မနှင့်ပုဒ်မ ၂၆ ပါ ကိစ္စများအလိုငှါ ''မိသားစု'' ဆိုသည့်စကားရပ်တွင် တရားဝင်လင်၊ တရားဝင်မယား၊ သို့တည်းမဟုတ် မယားများနှင့်တရားဝင်သားသမီးများပါဝင်သည်။

၂၅။ ။(၁) လင်မယားကွာရှင်းမှုကိစ္စ၊ ပစ္စည်းခွဲဝေမှုကိစ္စ၊ သားသမီးထိန်းသိမ်းမှု ကိစ္စတို့ဆိုင်ရာ ဗုဒ္ဓဘာသာဓမ္မသတ်၏ ပြဋ္ဌာန်းချက်များသည်၊ ဤအက်ဥပဒေအရ ထိမ်းမြားကြသူဘိုအပေါ်သို့၊ သို့တည်းမဟုတ်ထိမ်းမြားခဲ့ကြသည်ဟု မှတ်ယူခြင်းခံရသူတို့အပေါ်သို့၊ ထိုသူတို့သည် ဗုဒ္ဓဘာသာဝင် မြန်မာလူမျိုးချည်း ဖြစ်ဘိသကဲ့သို့ အာဏာသက်ရောက်ရမည်။

ခြွင်းချက်။ ။သို့ရာတွင်၊ တရားဥပဒေကဲ့သို့ အာဏာရှိသော ဘာသာရေးဓလေ့ထုံးစံတခုခုကဖြစ်စေ ထိုသို့သောဘာသာရေးဓလေ့ထုံးစံကိုအကျိုးသက်ရောက်စေသည့် တရားဥပဒေတခုခုကဖြစ်စေ၊ ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့် ယောကျ်ားတဦးအား ဗုဒ္ဓဘာသာဝင်မိန်းမတဦးနှင့် လင်မယားအဖြစ် ပေါင်းဖက်နေခြင်းကို ခွင့်မပြုသည့်အကြောင်းကြောင့်၊ ထိုယောကျ်ားက ထိုမိန်းမကို ကွာရှင်းလိုလျှင် ကွာရှင်းနိုင်သည်။ ထိုအကြောင်းကြောင့်ထိုယောကျ်ားက ထိုမိန်းမကို ကွာရှင်းလျှင်၊ သို့တည်းမဟုတ် စွန့်ခွာလျှင်၊ သို့တည်းမဟုတ် ကိုယ်ထိလက်ရောက် ညှဉ်းပန်းနှိပ်စက်ရာရောက်သည်ဖြစ်စေ၊ မရောက်သည်ဖြစ်စေ၊ ရက်စက်သည့်အပြုအမူအားဖြင့် စိတ်ဆင်းရဲအောင်ပြုလျှင်၊ အဆိုပါဓလေ့ထုံးစံက၊ သို့တည်းမဟုတ် တရားဥပဒေက မည်သို့ပင် ဆိုစေကာမူ—

(က) ထိုယောကျ်ားသည်၊ နှစ်ဦးပိုင် ပစ္စည်းများမှ မိမိရထိုက်သောအစုကိုစွန့်လွှတ်ရမည့်ပြင်၊ ဗုဒ္ဓဘာသာဝင် မိန်းမအားလျော်ကြေးပေးရမည်။

(ခ) ဗုဒ္ဓဘာသာဝင်မိန်းမသည်၊ သားသမီးအားလုံး ထိန်းသိမ်းခွင့်ကို ရရှိရမည်။ ထိုပြင်

(ဂ) ထိုသူသည် အရွယ်မရောက်သေးသည့် သားသမီးများအတွက်၊ ခလေးစရိတ်ပေးရမည်။

(၂) ပြည်ထောင်စု မြန်မာနိုင်ငံသား ဖြစ်သည့် ဗုဒ္ဓဘာသာဝင် မဟုတ်ခဲ့ဘူးသော မိန်းမတဦးသည်၊ ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့် ယောကျ်ားနှင့် လင်မယားအဖြစ် ပေါင်းဖက်နေစဉ်၊ ဗုဒ္ဓဘာသာသို့ကူးပြောင်းကိုးကွယ်လျှင် ထိုသူတို့သည်၊ ၎င်အက်ဥပဒေအရ၊ ထိမ်းမြားကြေဘိသကဲ့သို့ ပုဒ်မ ၂၄ နှင့် ပုဒ်မ ၂၅(၁)ပါ ပြဋ္ဌာန်းချက်များသည်ထိုသူတို့နှင့်သက်ဆိုင်ရမည်။

ခြင်းချက်။ ။သို့ရာတွင် ထိုမိန်းမ ဗုဒ္ဓဘာသာသို့ ကူးပြောင်းကိုးကွယ်သည့် အခါတရားဥပဒေကဲ့သို့အာဏာရှိသောထိုယောကျ်ား၏ဘာသာရေးဓလေ့ထုံးစံတခုခု ကဖြစ်စေ၊ ထိုသို့သော ဘာသာရေးဓလေ့ထုံးစံကို အကျိုးသက်ရောက်စေသည့် တရားဥပဒေတခုခုကဖြစ်စေ၊ ထိုယောကျ်ားအားထိုဗုဒ္ဓဘာသာဝင်မိန်းမနှင့် လင်မယားအဖြစ် ပေါင်းဖက်နေခြင်းကို ခွင့်မပြုသည့်အကြောင်းကြောင့် ကွာရှင်းလိုသော် ထိုမိန်းမ ဗုဒ္ဓဘာသာသို့ကူးပြောင်းကိုးကွယ်သည့်နေ့မှ သင့်လျော်သည့်ကာလအပိုင်းအခြားအတွင်း ထိုယောကျ်ားကဖြစ်စေ၊ ထိုမိန်းမကဖြစ်စေကွာရှင်းနိုင်သည်။ ထိုအကြောင်းကြောင့်—

(က) ထိုယောကျ်ားက ထိုမိန်းမကို ကွာရှင်းလျှင်—

(ကက) ဗုဒ္ဓဘာသာသို့ ကူးပြောင်းကိုးကွယ်ခြင်းမပြုမီက၊ ထိုမိန်းမ နေထိုင်ရသည့် အတန်းအစားအခြေအနေအောက်မလျော့သော အတန်းအစားအခြေအနေတွင်ဆက်လက်နေထိုင်နိုင်အောင်လုံလောက်သည့် လစဉ်စရိတ်ကိုထိုမိန်းမနောက်ထပ်ထိမ်းမြားခြင်း မပြုသမျှကာလပတ်လုံး ထိုယောကျ်ားက ထိုမိန်းမအားပေးရမည်။

(ခခ) ထိုမိန်းမ ဗုဒ္ဓဘာသာသို့ ကူးပြောင်း ကိုးကွယ်ခြင်းမပြုမီက၊ ထိုမိန်းမတဦးတည်းပိုင် ဖြစ်သော ပစ္စည်းအားလုံးကို ထိုမိန်းမရခွင့်ရှိရမည်။ သို့သော်လည်း ထိုသို့ကူးပြောင်း ကိုးကွယ်ခြင်းမပြုမီက ထိုယောကျ်ားတဦးတည်းပိုင် ဖြစ်သောမည်သည့် ပစ္စည်းကိုမျှ ထိုမိန်းမ ရခွင့်မရှိစေရ။

(၁၈) ထိုမိန်းမသည် အရွယ်မရောက်သေးသည့် သားသမီးအားလုံးထိန်းသိမ်းခွင့်ကိုရရှိရမည်။ ထိုပြင်

(ဃဃ) ထိုယောကျ်ားသည် အဆိုပါ အရွယ်မရောက် သေးသည့် သား သမီးများအတွက် ခလေးစရိတ်ပေးရမည်။

(ခ) ထိုမိန်းမက ထိုယောကျ်ားကို ကွာရှင်းလျှင်—

(ကက) ထိုမိန်းမ ဗုဒ္ဓဘာသာသို့ ကူးပြောင်းကိုးကွယ်ခြင်း မပြုမီက၊ ထိုမိန်းမ တဦးတည်းပိုင် ဖြစ်သော ပစ္စည်းမှတပါး၊ ထိုယောကျ်ားတဦးတည်းပိုင်သောမည်သည့်ပစ္စည်းကိုမျှ ထိုမိန်းမ ရခွင့်မရှိစေရ။

(ခခ) ထိုမိန်းမသည် အရွယ်မရောက်သေးသည့် သားသမီးအားလုံးထိန်းသိမ်းခွင့်ရရှိရမည်။

(၁၁) ထိုယောကျ်ားသည် အဆိုပါ အရွယ် မရောက်သေးသည့် သားသမီးများအတွက် ခလေးစရိတ်ပေးရမည်။

ရှင်းလင်းချက်။ ။ဤပုဒ်မပါ ဘာသာရေးဓလေ့ထုံးစံဆိုသည့် စကားရပ်၌ ''ဘာသာ'' ဆိုသည်မှာ ဗုဒ္ဓဘာသာဝင်ဖြစ်သည့် မိန်းမနှင့် ပေါင်းဖက်သည်မှ စ၍ ထိုမိန်းမ၏လင်ယောကျ်ားအစဉ်တစိုက်ကိုးကွယ်သည့်ဘာသာကို ဆိုလိုသည်။

(၃) ဤပုဒ်မပါ ပြဋ္ဌာန်းချက်များသည် ဤအက်ဥပဒေ စတင် အာဏာဝင်တည်မီ ခြောက်လအတွင်း၊ ဗုဒ္ဓဘာသာဝင်မိန်းမနှင့် ထိုမိန်းမ၏ ဗုဒ္ဓဘာသာဝင်မဟုတ်သည့် လင်ယောကျ်ားတို့ဖြစ်ပွါးသော (အာဏာရတရားရုံးက ဒီကရီချမှတ်ပြီးသည့် လင်မယားကွာရှင်းမှုကိစ္စမပါ) လင်မယားကွာရှင်းမှုကိစ္စ၊ သို့တည်းမဟုတ် ဗုဒ္ဓဘာသာဝင် မဟုတ်သည့် လင်ယောကျ်ားက ဗုဒ္ဓဘာသာဝင်မိန်းမကို စွန့်ခွါသည့်ကိစ္စ၊ သို့တည်းမဟုတ် ကိုယ်ထိလက်ရောက်ညှဉ်းပန်းနှိပ်စက်ရာ ရောက်သည်ဖြစ်စေ၊ မရောက်သည်ဖြစ်စေ၊ ရက်စက်သည့်အပြုအမူအားဖြင့် စိတ်ဆင်းရဲအောင်ပြုသည့်ကိစ္စ အားလုံးနှင့် သက်ဆိုင်ရမည်။

၂၆။ ။ဤအက်ဥပဒေအရ ထိမ်းမြားကြသူတို့၏၊ သို့တည်းမဟုတ် ထိမ်းမြားခဲ့ကြသည်ဟု မှတ်ယူခြင်းခံရသူတို့၏ အမွေဆက်ခံမှုနှင့် စပ်လျဉ်းသည့်ကိစ္စအားလုံးကို ထိုသူတို့နှင့် ထိုသူတို့၏မိသားစုအားလုံးသည့် ဗုဒ္ဓဘာသာဝင်မြန်မာလူမျိုးချည်းဖြစ်ဘိသကဲ့သို့၊ ဗုဒ္ဓဘာသာဓမ္မသတ်အတိုင်း ဆုံးဖြတ်ရမည်။

၂၇။ ။ဤအက်ဥပဒေအရ ထိမ်းမြားလျှင်၊ သို့တည်းမဟုတ် ထိမ်းမြားသည်ဟု မှတ်ယူခြင်းခံရလျှင်၊ ထိုသူနှစ်ဦးမှ ဖွါးမြင်သော သား သမီးများသည် တရားဝင်သား သမီးများဖြစ်သည်ဟုမှတ်ယူရမည်။

၂၈။ ။မည်သူမဆို၊ မဟုတ်မမှန်သည်လည်းဖြစ်၍၊ မဟုတ်မမှန်ဟု မိမိသိသည်လည်းဖြစ်သော၊ သို့တည်းမဟုတ် ယုံကြည်သည်လည်းဖြစ်သော ဖေါ်ပြချက်ပါရှိသည့် (ဤအက်ဥပဒေအရ ပြဋ္ဌာန်းထားသော) ထုတ်ဖေါ်ချက်ကိုသော်၎င်း၊ ထိုသို့သောသက်သေခံလက်မှတ်ကိုသော်၎င်း ပြုလုပ်လျှင်၊ သို့တည်းမဟုတ် လက်မှတ်ထိုးလျှင်၊ သို့တည်းမဟုတ် မှန်ကန်ကြောင်း သက်သေခံလျှင်၊ ထိုသူသည် ရာဇသတ်ကြီးပုဒ်မ ၁၉၉ အရ ပြစ်မှုကျူးလွန်သည်ဟူ၍ မှတ်ယူရမည်။

၂၉။ ။မည်သည့်မှတ်ပုံတင်အရာရှိမဆို—

(၁) ဆိုင်ရာအကြောင်းကြားစာ ရရှိလျှင်၊ ထိုအကြောင်းကြားစာကို ပုဒ်မ ၇ အရ ကျေညာခြင်းမပြုဘဲ၊ သို့တည်းမဟုတ်

(၂) ဆိုင်ရာအကြောင်းကြားစာကိုမိမိရရှိရပြီးနောက် ၁၄ ရက်အတွင်း သို့တည်းမဟုတ်

(၃) ထိမ်းမြားမည့်မိန်းမသည် အသက် ၂၀ မပြည့်သေးလျှင်၊ ထိုမိန်းမ၏မိဘထံမှဖြစ်စေ၊ မိဘသေဆုံးလျှင် အုပ်ထိန်းသူထံမှဖြစ်စေ၊ လိုအပ်သည့် သဘောတူချက်ကို ရရှိပြီးမဟုတ်ဘဲ၊ သို့တည်းမဟုတ်

(၄) ပုဒ်မ ၁၁ ပုဒ်မခွဲ (၁)၊ ပုဒ်မ ၁၂ ပုဒ်မခွဲ (၃) အပိုဒ် (က)၊ ပုဒ်မ ၁၂ ပုဒ်မခွဲ (၆) အပိုဒ် (ခ) တခုခုပါ ပြဋ္ဌာန်းချက်များနှင့်ဆန့်ကျင်၍

သိလျက်နှင့်တမင် ဤအက်ဥပဒေအရ ထိမ်းမြားပေးလျှင်၊ ထိုအရာရှိသည် တနှစ်ထိ ထောင်ဒဏ်ဖြစ်စေ ၅၀၀ ထက်မပိုသောငွေဒဏ်ဖြစ်စေဆျမှတ်ခြင်းခံထိုက်စေရမည်။

၃၀။ ။နိုင်ငံတော် သမတ သည်၊ ဤအက်ဥပဒေပါကိစ္စများကို ဆောင်ရွက်ရန်အလို့ငှါ နည်းဥပဒေများပြုနိုင်သည်။

၃၁။ ။ဗုဒ္ဓဘာသာဝင်မိန်းမများအထူးထိန်းမြားမှုနှင့် အမွေဆက်ခံမှု အက်ဥပဒေ (၁၉၃၉ ခုနှစ်၊ မြန်မာနိုင်ငံ အက်ဥပဒေအမှတ် ၂၄) ကို ဤအက်ဥပဒေဖြင့် ရုပ်သိမ်းလိုက်သည်။

BIBLIOGRAPHY.

Aggarwala, D.N.: The Hindu Marriage Act, 1955, (Allahabad), 1957.

Altekar, A.S.; The position of women in Hindu Civilisation. 2nd Ed. Benares 1956.

Ambedkar, S.R.: Who were the Shudras, (Bombay), 1946.

Banerjee, B.; Lectures on the Hindu Law of Marriage and Stridhan, 2nd Ed. London 1876.

Brissand, J.; History of French Private Law, 1912.

Bromley, P.M.; Family Law, (London) 1956.

Buhler, G.; Gautama (Sacred Book of the East) Vol.II.

" " Vasishtta (Sacred Book of the East) Vol.II.

" " Manu (Sacred Book of the East) Vol.XXV.

Cachard, H.; The French Civil Code, 1939.

Chan Toon: The Principles of Buddhist Law, Rangoon, 1903.

Choudary, D.H.: The Special Marriage Act, 1954.

Choudhary, Roop L.: Origins of the Limited Estate in Hindu Law, A.I.R.(1959) Journal, Section 55.

Cobden Ramsay, L.E.B.: Bengal Gazetteers - Feduatory State of Orissa, Vol.XXI.

De Moubray, G.A.: Matriarchy in the Malay Peninsula and neighbouring countries, (London) 1931.

Derrett, J.D.M.: An Indian Contribution to the study of property: Bulletin of the School of Oriental and African Studies, Vol.XVIII, 1956.

" " Svatva Rahasyam: a 17th century contribution to logic and law annals.

" " The origins of the Lawsof the Kandyans; The University of Ceylon Review, Vol.XIV, No.3 and 4.

Dicey, A.V.: Law and Opinion in England, London, 1905.

Donnison, F.S.V.: Public Administration in Burma, Royal Institute of International Affairs, London 1953.

Dunkley, H.F.: Digest of Burma Rulings (1872-1923), Superintendent, Government Printing, Rangoon.

Dutt, A.C.: The Indian Contract Act, (Calcutta) 1951.

Eggar, A.: Laws of India and Burma.

Forchhammer, E.: Jardine Prize Essay. Government Press, Rangoon 1885.

Furnival, J.S.: Manu in Burma, Journal of the Burma Research Society. Vol.30, Part II, p.351.

" " An Introduction to Political Economy of Burma. Burma Book Club, Rangoon, 1937.

Furnival, J.S.: The Fashioning of Leviathan. Journal of the Burma Research Society, Vol.29, P.1.

Gharpure, J.R.: Hindu Law, 4th Ed. Bombay 1931.
" " Rights of Women under Hindu Law, Bombay.
Gledhill, A.: Cruelty as a ground for Divorce at Burmese Buddhist Law, Bulletin of the School of Oriental and African Studies, (London) Vol.XIII, Part 2. 1950.
" " Burmese Law in the 19th century with special references to the position of women.
Gupte, S.V.: Hindu Law in British India, II Edn. 1947.
Gywe, U Tha,: Conflict of Authority in Buddhist Law, Vol.I. 1919; Vol.II. 1920. Winterbotham & Mandalay.
" " A Treatise on Buddhist Law, Mandalay, Vol.I, 1909.

Hall, D.G.E.: A History of South East Asia, Macmillan, London 1955.
Harvey, G.E.: History of Burma, London 1925.
" " The writings of Burmese History, Journal of the Burma Research Society, Rangoon, Vol.IX, 1919.
Hayley, F.A.: A Treatise on the Laws and Customs of the Sinhalese: Kandyan Law (Colombo) 1923.
Hemingway, F.R.: Madras District Gazetteers (1907).
" " Gazetteer of the Tanjore District (1915) Vol.I.
Hla Aung: Sino-Burmese Marriages and Conflict of Laws, The Burma Law Institute Journal, Vol.I, No.1.
Holland, T.E.: The elements of Jurisprudence.
Htin Aung: Customary Law in Burma: The fifth anniversary, Burma, 1953. Vol.III, No.2.

Indra: The status of women in ancient India, 2nd Ed. Benares, 1955.
Innes, C.A.: Gazetteer of the Malabar and Anjango District (1908) Vol.I.
Iyer, K.: The Smritichandrika. Madras (1936) Translation.

Jardine, J.: Notes on Burmese Buddhist Law, 8 Parts. Government of Burma Press, Rangoon, 1882.
Jennings and Tambiah, H.W.: The Dominion of Ceylon: the development of its Laws and Constitution (Colombo) 1952.
Jolly, J. Institute of Narada, (1876) Calcutta.
" " Narada Smriti (Sacred Book of the East, Volume XXXIIII) London 1876, (Translation).

Jolly, J.: Vishnu Smriti (Sacred Book of the East) Volume VII, (Translation).
Joshi, L.D.: The Khasa Family Law, in the Himalayan District of the U.P. India, 1929.
Kane, P.U.: History of Dharmasastra, Poona (1930-1953).
Karmarker, A.P.: A review - Who were the Shudras, Bhandarker Annals, Poona Oriental Research Institute, Poona, Vol.XXX, 1949.

Lahiri, S.C.L.: Principles of Modern Burmese Buddhist Law, 4th Edn. Calcutta, 1939.
Lewis Rice, B.: Mysore Archaelogical Series, epigraphia carnatica, Vol.VI, (1901).
Lingat, R.: L'Esclavage Prive dans le vieux droit Siamois. Etudes de Sociologie et d'Ethnologie Juridique VI, Paris, 1931.
" " Vinaya et Droit Laique. Bulletin de l'Ecole Francaise d'Extreme Orient. Tome 37, p.415,1937.
" " La Conception du Droit dans L'Indochine. Hinayaniste. Bulletin de l'Ecole Francaise d'Extreme Orient. Tome 45. Fasc.L.P.163, 1951.
" " Les Regimes Matrimoniaux du Sud-Est de L'Asie. Tome 1. Ecole Francaise d'Extreme Orient. Paris, 1952.
" " The Buddhist Manu of the propagation of Hindu Law in Hanayanist Indochina, Annals of the Bhanderkar Oriental Research Institute, Poona, Vol.XXX (1949).
Loeb, Edwin M.: Sumatra, its history and people, Wiener Bertrage zur Kulturgeschichte und Linguistic des Institutes Fur Volkerunde der Universitat, Wien, Vol.III.

Mabel Haynes Bode: The Pali Literature of Burma (London) 1909.
Maine, H.J.S.: Ancient Law, London, 1905.
Mandlik, V.N.: The Vyavahara Mayukha (Translation) Bombay 1880.
Mantha Ramamurthi: Guardianship and Wards Act (VIII of 1890), 1954.
Maung, U.E.: Burmese Buddhist Law. New Light of Burma Press, Rangoon, 1937.
" " The Expansion of Modern Burmese Law. Royal Printing Works, Rangoon, 1951.
Maynes, J.D.: Mayne's Treatise on Hindu Law and Usage, 11th Edn. Mad. 1950.
Mg.Tetto: Manoo Reng. Government Press Rangoon, 1878.
Mg.Tetto: Manoo Thara Shwemyin, Government Press Rangoon, 1879.
Mitter, D.N.: The position of women in Hindu Law, Calcutta (1913).

Mootham, O.H.: Burmese Buddhist Law, Oxford, 1939.
Muttukisna, H.F.: The Thesawaleme or The Laws and Customs of Jaffna, (Colombo) 1862.

Nelson, Innes: Hindu Law, Madras (1877).
" " A View of the Hindu Law as administered by the High Court of Judicature at Madras (1877).
" " Indian Usage and Judge made Law in Madras, (London) 1887.
" " Vedic Basis of Hindu Law (Madras) 1877.
Noton B.: Leading Cases on Hindu Law of Inheritance, Madras, 1870.

Paton, G.N.: Text Book of Jurisprudence.
Pereira, J.C.W.: The Laws of Ceylon Colony, (Colombo) 1913.
Pradhan, M.W.: The Guardianship Acts, (Bombay) 1958.

Rallingan, W.H.: A Digest of Civil Law for the Punjab chiefly based on the customary Law (11th Ed.) 1929.
" " A Digest of Civil Law for the Punjab (1929).
Rankin, G.C.: Background of Indian Law, Cambridge 1946.
Reginald Le May: The Culture of South East Asia, London, 1954.
Richardson, D.: Manugye. Text and Translation, Hanthawaddy Press, Rangoon, 1896.
Roe, Arthur, and Rallingan, H.A.B.: Tribal Law in the Punjab (1895).
Roy, S.: Customary Law in India.

Saksena, K.P.: The Hindu Marriage Act, 1955, Second Edn. (1958), Lucknow.
" " Muslim Law as administered in India and Pakistan, Lucknow, 1949.
Sastris, G.S.: Hindu Law (Calcutta), 8th Edn.
Saya Pwa: Yesayge Hkondaw Pyatton, Rangoon, 1947.

Tambiah, H.W.: The Laws and Customs of Ceylon, Colombo, 1954.
" " The Laws and Customs of the Tamils of Jaffna, Colombo, 1954.
" " The Alexander Johnstone Papers (Colombo) 1954.
Taylor, E.N.: Malay Family Law, Malayan Branch - Royal Asiatic Society. (Singapore) Vol.XV, (1937).
Tolstoy, D.: Law and Practice of Divorce and Matrimonial Cases, London, 1954.

U.Gaung, ex-Kinwun Mingyi: Attasankhepa Vannana, with Translation. Superintendent, Government Printing, Rangoon.

" " A Digest of the Burmese Buddhist Law. Vol.I. Marriage. Vol.II. Inheritance, in Burmese and English. Rangoon. Superintendent, Government Printing, 1909.

U May Oung: A Selection of Leading Cases on Buddhist Law, Rangoon, 1926.

Wilkinson, R.J.: Further notes upon the study of Ancient Times in the Malay Peninsula: Malayan Branch, Royal Asiatic Society, Vol.XV, Part 1, 1937, Singapore.

Windstedt, R.O.: The Malays - A Cultural History (London) 1950.

" " Malay and its History, (London).

" " An Old Minangkabau Legat Digest from Perak: Journal of the Malayan Branch, Royal Asiatic Society, Vol.XXVI, Part 1, July 1953.

" " Mother-right among Khasis and Malays, Malayan Branch, Journal of the Royal Asiatic Society, Singapore, 1932.

" " History of Negri Sembilan, Malayan Branch, Journal of the Royal Asiatic Society, part III, Singapore, 1936.

" " A History of Perak; Journal of the Malayan Branch of the Royal Asiatic Society, Singapore, 1934.

TABLE OF CASES.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

M. (Cont'd)

N.

N. (Cont'd)

P.

Q.

R.

R. (Cont'd)

S.

T.

T. (Cont'd)

U.

V.

W.

Y.

Z.

GENERAL INDEX.

GLOSSARY.

apatittha, a form of adoption; the casual adoption of a son or daughter; 578, 608

bhikku, see phongyi

chatabhatta, compassionate adoption of a son or daughter; an obsolete form of adoption; 609

Dullaba rahan, a person who becomes a monk for a limited period, 468.

eindaunggyi, a person who has been married but whose marriage has been determined, 376

garubhan, a form of religious property; it includes monasteries, and trees, the land upon which they stand and the like, 762

hnapazon, property jointly acquired during marriage, 360

illatom, a custom known as that of illatom adoption prevails among the Reddi and Kamma castes in the Madras Presidency, and Andhra State. It consists in the affiliation of a son-in-law, in consideration of assistance in the management of the family property, 46.

jobye-nanbye, Sham (temporary) mutual consent divorce in order to get rid of illness or other ill luck, as recommended by a consulting astrologer until such time as the planets are favourably placed, 426

kanitha child, a younger child, 694

kanwin, property set apart at the time of marriage by the bridegroom or his parents for the joint purposes of the married pair, 361

kilitha, a casually begotten child, 617

kittima, a form of adoption of a son or daughter with the intention that the child shall inherit to the adoptive parents, 578, 607

kobo, body price, 259, 434

lettetpwa, property acquired by either spouse or by both during the continuahce of the marriage, 350

let-so-maya, superior wife, 232, 240

Maya nge, lesser wife, 233

nissaya and nissita, Supporter and dependant; the supporter gets more than the nissita, 373,374

orasa, a child, usually the eldest, who is, in certain circumstances, entitled to a special share in his or her parents' estate, 671

payin, property which belonged to husband or wife before the marriage, 349

phongyi, Burmese Buddhist monk, 344, 460, 764

Rahan, a phongyi

Sangha, the order of Burmese Buddhist Monks, 429, 463

shinbyu, all young Burmese males of good family undergo the shinbyu ceremony which involves entering the Order for a few days, 470

smrtis, The Smritis (what is recollected or remembered) are of human origin and refer to what is supposed to have been in the memory of the sages who were the repositories of the Revelation. They are the Dharmas-astras, 125

swanutta, undutiful son, the son like a dog, or shortly, dog son, 756

thedansa, a formal division of property among heirs, orally or in writing when parents are conscious of the approach of death, 556

thinthi, separate property of husband or wife, 350

Vedas, The Sruti (that which has been heard) is in theory the primary and paramount source of Hindu Law, and is believed to be the language of divine Revelation. By the term Sruti the four Vedas namely, Rigveda, Samaveda, Yajurveda, Atharvaveda are meant. The Sruti, however, has little, or no, legal value. It contains no statements of law as such, though its statements of facts are occasionally referred to in the Smrtis and the Commentaries, as conclusive evidence of a legal usage. Our knowledge of the Indo Aryans is based on the evidence of Vedic literature.

Rigveda, is a collection of hymns by a number of priestly families, recited or chanted by them with appropriate solemnity at sacrifices.

Samaveda, is nothing but a collection of melodies.

Yajurveda, is a ritual Veda, and it is essentially a guide book for the priests who had to do practically everything in the ~~same~~ sacrifices, excepting reciting the Mantras and chanting the melodies. The white Yajurveda (or pure Yajurveda) is so called because Mantras (verses, hymns) and Brahmana (rituals) are not mixed up in it. But later, Mantra and Brahmana got mixed up in it and hence known as Black Yajurveda (im-pure form); they are nothing but collections of short magic spells used by a certain class of priests at the sacrifices.

Atharvaveda, is the most important and interesting of the four. It describes the popular beliefs, and superstitions of the humble folk, as yet only partly subjugated by Brahmanism.

The oldest sources of Hindu Law are the Vedas. The Vedas contain passages alluding to the Brahma, Asura and Gāndharva forms of marriage, to the necessity for a son, to the partition amonst sons and to exclusion of women from inheritance, 25, 53, 125